Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 81-213)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: August 12, 1981

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Dominicana de Aviacion C. por A., Santo Domingo, Dominican Republic; National Union Fire Ins. Co. of Pittsburgh, PA (PB 12/5/72) D 8/2/80 [1]	June 3, 1981	June 9, 1981	J.F.K. Airport $100,000

[1] Surety is American Home Assurance Company.

The foregoing principal has not been designated as a carrier of bonded merchandise.

BON-3-01

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

19 CFR Part 177

(T.D. 81-214)

Tariff Classification: Ornamented and Not Ornamented Wearing Apparel

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice announcing the application of a court decision to the tariff classification of certain merchandise.

SUMMARY: This notice advises the public of the manner in which the Customs Service will apply the principles announced by the U.S. Court of Customs and Patent Appeals in *The Ferriswheel* v. *United States* to certain specified garments. The rejection by the court of the so-called "traditional feature" doctrine will result in the classification by Customs of certain western-style shirts as ornamented. Certain raincoats having epaulets will continue to be classified as not ornamented. Certain shirts with hanger loops, previously classified as ornamented because of the presence of such loops, will hereafter be classified as not ornamented. The classification of military-style and bush/safari garments with epaulets will be determined on a case-by-case basis.

EFFECTIVE DATES: The change in classification with respect to western-style shirts, military style and bush/safari garments with epaulets, described below, will be effective (120 days from the date of publication of this notice in the Federal Register). The change in classification with respect to shirts with hanger loops, as described below, will be effective (the date of publication of this notice in the Federal Register).

FOR FURTHER INFORMATION CONTACT: Philip Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In classifying wearing apparel for Customs purposes, the question often arises whether or not such apparel is ornamented or not ornamented. Generally, ornamented wearing apparel is subject to a higher rate of duty than not ornamented wearing apparel.

On February 21, 1980, the United States Customs Court issued its decision in *The Ferriswheel* v. *United States*, C.D. 4844, concerning the ornamentation of certain wearing apparel. The court held that

Scottish Highland ceremonial jackets with traditional (but primarily decorative) epaulets, and braid which simulates buttonholes, were ornamented wearing apparel. In view of this decision, Customs published a notice in the Federal Register on August 14, 1980 (45 FR 54085), advising the public that Customs was reviewing its uniform and established practices of classifying certain garments with traditional, but primarily decorative, features as not ornamented wearing apparel and of classifying garments with simulated functional features also as not ornamented. The notice requested comments from interested parties on whether the *Ferriswheel* case required Customs to change its practice. Final action on the notice was postponed pending the decision of the U.S. Court of Customs and Patent Appeals on the appeal of the *Ferriswheel* case.

On March 12, 1981, the U.S. Court of Customs and Patent Appeals issued its decision in *The Ferriswheel* v. *United States*, C.A.D. 1260. The court (1) reaffirmed its previously stated rule that in order for a feature to constitute ornamentation for tariff purposes, that feature must be primarily decorative as opposed to being primarily functional; (2) rejected the idea that a clearly ornamental feature on a garment did not constitute ornamentation because it was traditional to the garment; and (3) held that functional capability, together with the appropriateness of that function to the garment, determines whether or not a feature is functional.

In rejecting the "traditional feature" doctrine of classification, the court expressly rejected the premise that garments with clearly ornamental features were classifiable as not ornamented because those features were necessary to make the garments authentic. Such garments, according to the court, must be judged by the same standards as other garments.

It has been the practice of Customs to classify certain western-style shirts with traditional but, in Customs view, primarily decorative, overlaid front and back shoulder yokes as not ornamented on the basis that the overlaid yokes were necessary to create an "authentic" western shirt. This premise has been clearly invalidated by the U.S. Court of Customs and Patent Appeals in the *Ferriswheel* case. Therefore, Customs believes it is required to apply to western-style shirts the principle expressed by the court that garments with traditional features "must be judged by the same standards as other articles of wearing apparel." That standard or test, as expressed in *Ferriswheel* and previously in numerous other court decisions, is whether the ornamental or decorative aspect of a feature on a garment outweighs the functional or utilitarian nature of that feature—whether the feature is primarily decorative or primarily functional.

In this regard, Customs has expressed the view in a number of

rulings that the overlaid yokes on western-style shirts are usually primarily decorative and only incidentally functional. Accordingly, those yokes would, except for the practice of classification that developed by reason of their being traditional on that type of shirt, normally be considered ornamentation.

All of the comments received in response to the notice published by Customs in the Federal Register on August 14, 1980, were completely reviewed. Several of the comments received relating to overlaid yokes on western-style shirts concerned factors which Customs could not legally consider, *e.g.*, the economic impact of classifying the shirts under the ornamented provisions of the tariff schedules. On the other hand, some of the commenters presented arguments which dealt with the legally relevant question of the various functions which the overlaid yokes serve and the utility of overlaid yokes generally.

After thoroughly considering all of the views expressed, it is Customs position that while there are some functional purposes served by the overlaid yokes, they do not appear to be sufficient to overcome the highly visible impact, which is decidely ornamental, that overlaid yokes usually present on garments.

In view of the principles set forth in the court decision, western-style shirts will be classified in accordance with the same standards as other garments and all western-style shirts with *primarily decorative* overlaid fabric yokes entered, or withdrawn from warehouse, for consumption after (120 days from the date of publication of this notice), will be classified under the ornamented wearing apparel provisions in the Tariff Schedules of the United States (19 U.S.C. 1202). All prior administrative rulings issued by Customs concerning the classification of western-style shirts with decorative overlaid yokes which are not in accordance with the principles stated in *Ferriswheel*, are, pursuant to section 177.9(d)(1), Customs Regulations (19 CFR 177.9(d)(1)), hereby revoked. The classification of such garments will, from (120 days from the date of publication of this notice), be determined on the characteristics of each garment.

As as result of this action, Customs anticipates that most western-style shirts with overlaid yokes will be classified as ornamented because the utility of the overlaid yokes is usually incidental to the decorative appearance they present. However, due to styling and construction differences, Customs recognizes that some overlaid yokes may, in fact, be primarily functional and, therefore, would not constitute ornamentation.

In the *Ferriswheel* case, the U.S. Court of Customs and Patent Appeals stated that a functional feature does not cease to be functional because it is not used by most wearers. Customs believes

that an overly broad interpretation and application of that principle is neither reasonable nor intended by the court. Where a feature, once functional, has virtually ceased to have any utility on a garment except in a few isolated instances, that feature is subject to the same standards as traditional features—whether it is primarily decorative or primarily functional. In making this determination, Customs will consider such a feature to be primarily functional on a garment if (1) the feature has a functional capability which is appropriate to the garment, and (2) there is credible evidence the feature is actually used and that such use is more than a fugitive use.

It has been Customs practice to classify certain types of garments with epaulets (raincoats, certain bush/safari jackets, and certain military-style garments) as not ornamented, even though in the view of Customs, the epaulets were primarily decorative. This practice was based on the idea that epaulets were traditional features on those garments. Because that premise is no longer valid, those garments must now be classified in accordance with the same standards as other garments.

Customs does not believe that the decision in the *Ferriswheel* case should affect the existing practice of classification of raincoats with functional epaulets. After reviewing the submissions received in response to the notice of August 14, 1980, Customs now believes that all prior rulings stating that any functional use of epaulets on raincoats constituted a "fugitive use", were in error. The submissions make it clear that the epaulets are actually used by a significant number of wearers of those raincoats. Therefore, raincoats with epaulets will continue to be classified as not ornamented barring other features on the garments which would cause a contrary classification.

Few of the comments received dealt with, or even mentioned, the classification of military-style and bush/safari garments with epaulets. In view of the invalidation of the "traditional feature" doctrine, the same principles of classification that apply to other garments will apply to military-style and bush/safari garments entered, or withdrawn from warehouse, for consumption after (120 days from the date of publication of this notice). From that date, the classification of those and all other garments with epaulets will be determined on a case-by-case basis based on the individual characteristics of each garment. Those characteristics will include, but not be limited to, the construction of the fabric comprising the garment (knit or woven), the weight of that fabric, and the styling and intended purpose of the garment. For example, knit garments or ones made from loosely woven fabrics would not normally have primarily functional epaulets. Further, garments designed for formal or dress wear or for sleeping

would usually not have epaulets which are primarily functional. All prior administrative rulings by Customs classifying military-style and bush/safari garments with epaulets as either ornamented or not ornamented, which are not in accordance with the principles stated in *Ferriswheel*, are, pursuant to section 177.9(d)(1), Customs Regulations (19 CFR 177.9(d)(1)), hereby revoked.

The U.S. Court of Customs and Patent Appeals in the *Ferriswheel* case did not decide the question of whether garments with simulated features should be classified as ornamented. Therefore, Customs, at this time, will not change its existing practice of classifying garments with simulated features which are located where the real features would normally be found and are no more decorative than the real features normally are, as not ornamented.

The *Ferriswheel* case has prompted Customs to review other aspects of the ornamentation question, one of which involves the classification of shirts with hanger loops located on the center of the back areas. It does not appear that such loops, if made from the same fabric as the garments on which they are located, are primarily decorative. Rather, it appears that loops of this nature are actually used to hang the garment. Accordingly, pursuant to section 177.9(d)(1), Customs Regulations (19 CFR 177.9(d)(1)), all prior rulings classifying shirts as ornamented due solely to the presence of hanger loops in the center of the back areas, are revoked. Customs will classify shirts with such loops as not ornamented, provided that no other features of the garment would cause a contrary classification.

AUTHORITY

This notice is being published in accordance with section 315(d), Tariff Act of 1930, as amended (19 U.S.C. 1315(d)), and section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

DRAFTING INFORMATION

The principal author of this notice was Robert J. Pisani, Regulations and Information Division, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: August 17, 1981.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

[Published in the Federal Register, Aug. 21, 1981 (46 F.R. 42446)]

(T.D. 81-215)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 USC 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
August 3–4, 1981	$0.000211
August 5–6, 1981	.000207
August 7, 1981	.000203
Chile peso:	
August 3–4, 1981	$0.025667
August 5, 1981	.025733
August 6 1981	.025667
August 7, 1981	.025575
Colombia peso:	
August 3–7, 1981	$0.018403
Greece drachma:	
August 3, 1981	$0.016327
August 4, 1981	.016273
August 5, 1981	.016287
August 6, 1981	.016300
August 7, 1981	.016103
Indonesia rupee:	
August 3–7, 1981	$0.001585
Israel shekel:	
August 3–7, 1981	$0.081900
Peru sol:	
August 3–7, 1981	$0.002342
South Korea won:	
August 3, 1981	$0.001455
August 4–6, 1981	.001454
August 7, 1981	.003289

(LIQ-03-01 O:C:E)

Date: August 7, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

352-986 O - 81 - 2

(T.D. 81-216)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 81-183 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruziero:	
August 3–5, 1981	$0.010322
August 6–8, 1981	.010090
Denmark krone:	
August 7, 1981	$0.125196
France franc:	
August 7, 1981	$0.164474
Hong Kong dollar:	
August 4, 1981	$0.168976
August 5, 1981	.168492
August 6, 1981	.168634
August 7, 1981	.168492
India rupee:	
August 7, 1981	$0.109170
Ireland pound:	
August 7, 1981	$1.4360
Japan yen:	
August 3, 1981	$0.004075
August 4, 1981	.004063
August 5, 1981	.004151
August 6–7, 1981	Quarterly
Republic of South Africa rand:	
August 3, 1981	$1.0428
August 4, 1981	1.0405
August 5, 1981	1.0500
August 6, 1981	1.0420
August 7, 1981	1.0435
Switzerland franc:	
August 3, 1981	$0.454959
August 4, 1981	.453721
August 5, 1981	Quarterly

August 6, 1981	$0.456850
August 7, 1981	.457666
Thailand baht (tical):	
August 3–7, 1981	$0.043384
United Kingdom pound:	
August 3, 1981	$1.8015
August 4, 1981	1.7935
August 5, 1981	1.8055
August 6, 1981	1.7980
August 7, 1981	1.7905

(LIQ–03–01 O:C:E)

Date: August 6, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 81–217)

Bonds

Approval and discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: August 17, 1981.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
ABC-Trans National Transport, Inc., 201 11th Ave., New York, NY; freight forwarder; Sentry Ins., A Mutual Co. D 7/23/81	Dec. 18, 1975	Jan. 12, 1976	Chicago, Ill. $50,000
Air Service Consolidator Transport, Inc., 795 Beahan Rd., Rochester, NY; motor contract; Old Republic Ins. Co.	Sept. 11, 1980	June 11, 1981	Buffalo, NY $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Belford Trucking Co., Inc., P.O. Box 270, Ocala, FL; motor carrier; Hartford Accident & Indemnity Co. (PB 3/10/78) D 5/18/81 [1]	Dec. 18, 1980	May 18, 1981	Miami, FL $25,000
Wayne Daniel Truck, Inc., P.O. Box 303, Mt. Vernon, MO; motor carrier; The Travelers Indemnity Co. (PB 9/25/79) D 7/30/81 [2]	July 30, 1981	July 30, 1981	St. Louis, MO $50,000
Angel D. Aguiar, dba: David Transport, 1501 East 8th Court, Hialeah, FL; motor carrier; St. Paul Fire & Marine Ins. Co.	May 18, 1981	June 29, 1981	Miami, FL $50,000
E Z Freight Lines, Gould St. & E. 46th St., Bayonne, NJ; motor carrier; Peerless Ins. Co. D 6/25/81	Mar. 5, 1980	Apr. 4, 1980	Newark, NJ $50,000
Evans Delivery Co., Inc., P.O. Box 268, Pottsville, PA; motor carrier; The Aetna Casualty & Surety Co. D 7/30/81	May 23, 1978	June 6, 1978	Philadelphia, PA $25,000
GTL Transport Co., Inc., P.O. Box 1944, Suffolk, VA; motor carrier; Selected Risks Ins. Co.	June 15, 1981	July 9, 1981	Norfolk, VA $50,000
Gateway Transportation Co., Inc., 455 Park Plaza Dr., LaCrosse, WI; motor carrier; The Aetna Casualty & Surety Co. (PB 7/12/79) D 8/6/81 [3]	July 12, 1981	July 13, 1981	Milwaukee, WI $25,000
Gullett-Gould Ltd., P.O. Box 406, Union City, IN; motor carrier; Protective Ins. Co. D 2/29/80	Jan. 7, 1980	Jan. 15, 1980	Nogales, AZ $25,000
Harbor Cartage Inc., 312 West End S. Detroit, MI; motor carrier; Sentry Ins., a Mutual Co.	June 18, 1981	June 29, 1981	Detroit, MI $50,000
Klausner Transportation Co., Inc., 101 N. Avenue 18, Los Angeles, CA; motor carrier; Washington International Ins. Co.	July 22, 1980	June 10, 1981	Los Angeles, CA $50,000
Long Transportation Co., Inc., 3755 Central Ave., Detroit, MI; motor carrier; Hanover Ins. Co. D 6/29/81	Dec. 3, 1974	Dec. 3, 1974	Detroit, MI $50,000
Mistletoe Express Service of Texas, Inc., P.O. Box 9325, San Antonio, TX; motor carrier; Kansas City Fire & Marine Ins. Co.	June 29, 1981	July 13, 1981	Laredo, TX $50,000
Morton Chain Co., 4551 N.E. 6th Ave., Ft. Lauderdale, FL; motor carrier; The Ohio Casualty Ins. Co.	Apr. 24, 1981	June 29, 1981	Miami, FL $25,000
Neptune World Wide Moving, Inc., 55 Weyman Ave., New Rochelle, NY; motor carrier; Commercial Union Ins. Co. D 2/9/81	Feb. 27, 1975	Apr. 14, 1975	New York Seaport $50,000
Nielsen Freight Lines, 1272 Gossage Ave., Petaluma, CA; motor carrier; Mid-Century Ins. Co.	May 26, 1981	June 26, 1981	San Francisco, CA $25,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Parent Cartage Ltd., 520 Hill St., Windsor, Ontario, Canada; motor carrier; Old Republic Ins. Co. (PB 7/20/72) D 7/20/81 [4]	July 20, 1981	July 20, 1981	Detroit, MI $50,000
Ports International Inc., 3730 N.W. 54th St., Miami, FL; motor carrier; Peerless Ins. Co.	May 11, 1981	June 30, 1981	Miami, FL $25,000
Sidney Truck & Storage, Inc., W. Campbell Rd., Sidney, OH; motor carrier; St. Paul Fire & Marine Ins. Co. D 7/14/81	Apr. 26, 1971	July 16, 1971	Cleveland, OH $25,000
CTD, Inc., dba: Statewide Haulers, Inc., 1800 Chicago, Laredo, TX; motor carrier; Royal Indemnity Co. (PB 7/14/80) D 7/6/81	June 24, 1981	July 6, 1981	Laredo, TX $25,000
Superior Express, 611 N. Mission Rd., P.O. Box 60100, Los Angeles, CA; motor carrier; St. Paul Fire & Marine Ins. Co.	Jan. 14, 1981	June 11, 1981	Los Angeles, CA $50,000
Texas Tex-Pack Express, Inc., P.O. Box 9325, San Antonio, TX; motor carrier; Hartford Accident & Indemnity Co. D 7/13/81	July 28, 1978	Aug. 10, 1978	Laredo, TX $50,000
Transportation Systems International Inc., 2500 Kennedy St., N.E., Minneapolis, MN; motor carrier; Great American Ins. Co.	Apr. 14, 1981	June 2, 1981	Minneapolis, MN $50,000
T. J. Trucking Inc., 425 Kennedy St., Oakland, CA; motor carrier; St. Paul Fire & Marine Ins. Co.	Feb. 1, 1981	June 26, 1981	San Francisco, CA $25,000

[1] Surety is National Bonding & Accident Ins. Co.
[2] Surety is Fidelity & Deposit Co. of MD.
[3] Principal is Gateway Transportation, Inc.; Surety is Hartford Accident & Indemnity Co.
[4] Surety is St. Paul Fire & Marine Ins. Co.

BON-3-03

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

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19 CFR Part 148

(T.D. 81-218)

Personal Declarations and Exemptions

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that a crewmember will not be considered a returning resident qualifying for the personal exemptions from the payment of duties and taxes allowed under the Tariff Schedules of the United States, unless the crewmember permanently leaves the vessel, vehicle, or aircraft in which he arrived from a foreign port, without the intention of resuming employment on the same or any other carrier engaged in international traffic. The change will ensure uniform treatment of crewmembers nationwide, and conform the regulations with a headnote of the Tariff Schedules of the United States.

EFFECTIVE DATE: (30 days from the date of publication in the Federal Register).

FOR FURTHER INFORMATION CONTACT: Legal Aspects: James F. Bartley, Entry Procedures and Penalties Division, (202–566–5765). Operational Aspects: Dennis Hazelton, Inspection and Control Division, (202–566–5607), U.S. Customs Service, 1301 Constitution Avenue NW, Washington D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 24, 1980, a notice was published in the Federal Register (45 FR 70476) of a proposal to amend section 148.65, Customs Regulations (19 CFR 148.65), relating to the qualification of crewmembers for the personal exemptions from the payment of duties and taxes allowed under the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). The personal exemptions from the payment of duty and taxes imposed on imported merchandise to which residents and nonresidents of the United States are entitled are set forth in Schedule 8, Part 2A, TSUS. Headnote 3 of Schedule 8, Part 2A, TSUS, provides that a person arriving on duty as an employee of a vessel, vehicle, or aircraft engaged in international traffic, or arriving from a trip during which he was so employed shall not be entitled to any of the personal exemptions other than those in item 814.00, TSUS, relating to articles for bona fide personal use which will be taken out of the United States, unless he is permanently leaving such employment without the intention of resuming it on the same or another carrier.

Under section 148.65(a), Customs Regulations (19 CFR 148.65(a)), a crewmember may qualify as a returning resident and be entitled to the exemptions allowed under Schedule 8, Part 2A, TSUS, in two situations. Section 148.65(a)(1) reflects the provisions of headnote 3, Schedule 8, Part 2A, TSUS, and provides that a crewmember may qualify as a returning resident if he permanently leaves the

carrier without the intention of resuming his employment on the same or another carrier engaged in international traffic. Under section 148.65(a)(2), a crewmember may also qualify as a returning resident if he remains on or transfers to a vessel which is to proceed to another port of the United States in a movement in which entry of the vessel will not be required.

Section 148.65(a)(2) apparently conflicts with the criteria set forth in headnote 3, of Schedule 8, Part 2A, TSUS, and Customs believes that the headnote must take precedence over the Customs Regulations. To resolve this discrepancy, Customs proposed to amend section 148.65(a) by including subparagraph (1) in the text of paragraph (a) and removing subparagraph (2).

As a conforming change, Customs proposed to remove the reference to subparagraphs (1) and (2) of section 148.65(a) from section 148.65 (b). The notice of October 24, 1980, erroneously stated that comments on the proposal were to have been submitted by November 23, 1980. By notice published in the Federal Register on November 26, 1980 (45 FR 78704), interested persons were advised that December 23, 1980, was the correct closing period to submit comments regarding the proposal.

DISCUSSION OF COMMENT

Only one comment was received in response to the notice of proposed rulemaking. The commenter expressed concern regarding the effect of removing section 148.65(a)(2), and requested clarification as to what personal duty exemption benefits, if any, would be lost to crewmembers by removal of the section.

Customs believes that the removal of section 148.65(a)(2) will ensure uniform treatment of crewmembers, and will not result in the loss of any personal duty exemption benefits to crewmembers to which they are legally entitled. Rather, it is anticipated that the removal of the section will prevent the bestowal of returning resident duty exemptions on those crewmembers who do not qualify for them.

In this regard, the treatment of crewmembers by Customs pursuant to section 148.65(a)(2) has not been uniform. For example, aircraft crewmembers returning to the United States as passengers on board commercial flights from a trip abroad on which they were employed as crewmembers (commonly referred to as "deadheading") frequently travel in civilian clothes and, in the ordinary course, are indistinguishable from other passengers on board. In some cases, "deadheading" crewmembers who did not permanently leave such employment and who did not remain on or transship to an aircraft which was to proceed to another port of the United States in a movement in which entry of

the aircraft was not required, were treated as passengers and granted returning resident duty exemptions pursuant to section 148.65(a)(2), to which they were not entitled. In these instances the "deadheading" crewmembers did not lose their status as crewmembers simply because they were not actively employed on the return flight to the United States.

The clear intent of headnote 3 of Schedule 8, Part 2A, TSUS, is to require that a crewmember permanently leave employment on a vessel, vehicle, or aircraft engaged in international traffic in order to qualify for returning resident duty exemptions. Because section 148.65(a)(2) conflicts with the headnote, and because the headnote takes precedence over the regulation, Customs believes that the removal of section 148.65(a)(2) will conform the regulations to the headnote and ensure uniform treatment of crewmembers.

In view of the above, Customs is amending section 148.65 as proposed.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

It has been determined that this amendment does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analyses were required, and none have been prepared for this regulatory project.

In addition, the provisions of section 3 of the "Regulatory Flexibility Act" (5 U.S.C. 603, 604) are not applicable to the amendment because, as noted above, a notice document was published in the Federal Register before January 1, 1981, the effective date of the Act.

DRAFTING INFORMATION

The principal author of this document was Robert Joseph Pisani, Regulations and Information Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENT TO THE REGULATIONS

Section 148.65, Customs Regulations (19 CFR 148.65), is amended as set forth below.

GEORGE C. CORCORAN, JR.,
Acting Commissioner of Customs.

Approved: July 24 1981.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

Section 148.65, Customs Regulations (19 CFR 148.65), is amended to read as follows:

§ 148.65 EXEMPTION FOR RESIDENT CREWMEMBERS.

(a) *Status as returning resident.* A crewmember arriving in a vessel, vehicle, or aircraft from a foreign port who is a resident of the United States shall be considered a returning resident qualifying for the exemptions allowed under Schedule 8, Part 2A. Tariff Schedules of the United States (19 U.S.C. 1202), and Subpart D of this part if he permanently leaves the carrier without the intention of resuming his employment on the same or any other carrier that is engaged in international traffic.

(b) *Statement of declaration.* A resident crewmember who claims that articles declared by him are entitled to be passed free of duty and tax under the returning resident's exemption, shall include a legible statement on the declaration. Customs Form 5129, of the basis for his claim for entitlement to the resident's exemption.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

[Published in the Federal Register, August 24, 1981 (46 F.R. 42656)]

352-986 O - 81 - 3

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 13, 1981.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

DONALD W. LEWIS,
Director,
Office of Regulations and Rulings.

(C.S.D. 81-181)

Value: Use of a Trigger Price To Establish an Export Value Is a Correct Method of Appraisement Pursuant to Section 402(b), Tariff Act of 1930, as Amended

Date: January 13, 1981
File: CLA-2 RRUCV
065107 TLL

DISTRICT DIRECTOR OF CUSTOMS,
San Juan, Puerto Rico

DEAR SIR: This is in reply to Application for Further Review of San Juan Protest Nos. 4099-9-000015 and 4909-9-000016, which were timely filed.

Issue: Whether the use of a trigger price was a permissible method of establishing export value.

Facts: The instant protests cover certain steel plate exported from Belgium on March 2, 1978 and ordered on August 12, 1977. Information at New York discloses that Belgium was offering steel plate at the trigger price.

Protestant claims that the invoice value, less certain non-dutiable charges, represents statutory export value. Protestant was unable to submit any evidence supporting this claim. The merchandise covered by this protest is not on the final list, TD 54521.

Law and analysis: Section 402(b) of the Tariff Act of 1930, as amended, provides:

> (b) EXPORT VALUE—For the purposes of this section, the export value of imported merchandise shall be the price, at the

> time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price the cost of all containers and coverings of whatever nature and other expenses incidental to placing the merchandise in condition packed ready for shipment to the United States.

Essentially, section 402(b) requires us to find either a "freely sold, or in the absence of sales, offered for sale" price in the principal markets of the country of exportation for exportation to the United States at the time of exportation. Thus to the extent merchandise subject to trigger pricing represents such a price, it is possible to find export value. Of course, whether or not export value would exist in a particular set of circumstances is a question of fact which must be determined on a case by case basis. On the basis of the facts established here, the trigger price figures used represent export value. The fact that the prices were for future delivery is no bar to the finding of export value. Therefore, you are directed to deny the protest.

Holding: Export value at the trigger price figure is the correct appraisement.

(C.S.D. 81–182)

Proper Tariff Classification of Wire "Cut to Length"

Date: February 11, 1981
File: CLA–2 CO:R:CV:G
065831 JLV

To: Chief, Duty Assessment Branch 1/11 New York Seaport.
From: Director, Classification & Value Division Headquarters.
Subject: Classification of wire cut to length.

In your memorandum of December 4, 1980, (Your file CLA–2-03–SCD–11–CST–18,437), you requested classification of Headquarters' position on the classification of cut wire in view of Section 20 of Public Law 96–467, October 17, 1980. Section 20 amended Headnote 3(i) to subpart B of part 2 of schedule 6, TSUS, by striking out "cut to length." The legislative history indicates that the primary purpose for the change was to ensure that certain small diameter cold finished steel bar would be classified as bar rather than as wire.

The issue is whether wire products cut to length, other than the small diameter cold finished steel bar, are now precluded from classification under the provisions for wire.

It is our opinion that the amended headnote language must control. The term "wire" is defined for tariff classification purposes in headnote 3(i) of subpart B, part 2, schedule 6, TSUS. The language is clear and should be applied as such. We note that the court in *Overton & Co.* v. *United States*, C.D. 4875 (1980), stated the statutory definitions for "bars" and "shapes" were determinative of the scope of the tariff provisions for such articles. The statutory provision for "wire" is similarly controlling.

The legislative history for section 20 of P.L. 96–467 indicates that the primary concern was to make certain that cold finished steel bars were classified under the provision for bars which carries a significantly higher rate of duty. On page S13661 of the Congressional Record, September 26, 1980, it was stated:

> * * * This provision would provide for a change in definition of steel wire so as to exclude the "cut to length" products, mainly of cold finished steel, from that definition.

It was also acknowledged in House Report No. 96–566 on H.R. 4309 (the original bill to change headnote 3(i)) that wire is usually shipped in coils whereas the small diameter cold finished steel bars are shipped cut to length.

It appears, therefore, that the Congress was aware that cut to length products other than steel bars would be affected. No attempt, however, was made to differentiate between these products. In view of this, we believe that wire, cut to length, is now precluded from classification as wire. Such wire would be classifiable under the appropriate provision for bar, or, if the wire does not fit the definition for bar, then it would be classifiable under the provision for angles, shapes, and sections.

The cut to length wire products would not be classifiable as either parts or as articles of metal unless it could be determined that they are processed to the degree that they are dedicated to the making of a specific article. *Avins Industrial Products Co.* v. *United States*, 62 C.C.P.A. 83, C.A.D. 11509(1975), is controlling on this issue.

(C.S.D. 81–183)

Classification: Protective Leather and Rubber Footwear

Date: February 13, 1981
File: CLA–2–07–S:C:D:6:60–14
800025

In a letter dated December 23, 1980, you inquired as to the dutiable status of three (3) styles of protective rubber bottomed, stitched

leather upper, footwear manufactured in Taiwan. Two (2) styles (#4446 and #4448) are below ankle height; in the remaining style (#476L), the laced leather upper extends above the ankle. Samples were submitted for examination.

You request the footwear classification rates that will apply to these prospective imports on and after July 1, 1981, as promulgated by Public Law 96–39; and, additionally, you request that the New York Regional Commissioner's classification determinations be in accordance with, and bound by, Customs Regulations Section 177.1(a), as amended by T.D. 80–285.

Style #4446 is a man's 3-eyelet tie oxford with a rubber/plastic molded bottom with a trimmed leather topline, variously extending down from the topline 1½ to 2½ inches, and stitched to the molded bottom. The unit molded bottom, which by itself virtually encloses the foot below the ankle, features a molded sole and ½ inch molded heel with a substantial calendered traction tread. This style is a modified version of the L.L. Bean Gum Shoe or the L.L. Bean Maine Hunting Shoe and is also variously known as a Foul Weather Shoe, Camp Shoe, Mud Moc and/or Rubber Duckie.

Style #4448 is a man's slip-on oxford with a rubber/plastic molded bottom and with a trimmed leather topline extending down from the topline one inch and stitched to the molded bottom. A single fabric lace is intertwined throughout the topline and tongue and serves as a tie closure. The unit molded bottom, which virtually encloses the foot below the ankle, features a molded sole and ½ inch molded heel with a substantial calendered traction tread. This style is also a modified version of the L.L. Bean Gum Shoe or the L.L. Bean Maine Hunting Shoe and is also variously known as a Foul Weather Shoe, Camp Shoe, Mud Moc and/or Rubber Duckie.

The Regional Commissioner at New York is of the opinion that styles #4446 and #4448 are classifiable under the provision for other footwear, which is over 50 percent by weight of rubber or plastics which is designed to be worn over, or in lieu of, other footwear as a protection against water or inclement weather and having soles and uppers of which not over 90 percent of the exterior surface area is rubber or plastics, in item 700.57, Tariff Schedules of the United States, and dutiable at the rate of 37.5 percent ad valorem. This classification and rate takes effect July 1, 1981.

Style #476L is a women's above-the-ankle 5-eyelet tie with a laced suede leather upper extending above the ankle and which is stitched to the molded bottom. The unit molded bottom, which virtually encloses the foot below the ankle, features a molded sole and ½ inch molded heel with a substantial calendered traction tread, polyurethane trim at the topline, and a suede leather pull-tab. This above-the-ankle

style is also variously known as a Foul Weather Shoe, Canadian Boot, and is a modified version of a women's L. L. Bean Maine Hunting Shoe. The importer states that the chief value of this shoe is the leather upper.

The Regional Commissioner at New York is of the opinion that providing the exterior surface area of the upper of women's style #476L is *over 50% leather* and the entire shoe is in *chief value of leather*, it is classifiable under the provision for other footwear of leather, for other persons in item 700.43 Tariff Schedules of the United States (TSUS), with duty at the rate of 15 percent ad valorem, if valued not over $2.50 per pair, or, in item 700.45, TSUS, with duty at the rate of 10 percent ad valorem, if valued over $2.50 per pair.

Further, the Regional Commissioner of Customs at New York is of the opinion that providing the exterior surface area of the upper of style #476L is *over 50% leather* and the entire shoe is in *chief value of rubber*, it is classifiable under the provision for other footwear, other, in item 700.95 Tariff Schedules of the United States (TSUS), with duty at the rate of 12½ percent ad valorem.

Lastly, if the exterior surface area of the upper in the women's style #476L is *50% or less of leather*, this shoe would be classifiable under the provision for other footwear, which is over 50 percent by weight of rubber or plastics which is designed to be worn over, or in lieu of, other footwear as a protection against water or inclement weather and having soles and uppers of which not over 90 percent of the exterior surface area is rubber or plastics, in item 700.57, Tariff Schedules of the United States, and dutiable at the rate of 37.5 percent ad valorem. These classifications and rates for style #476L will be those in effect on and after July 1, 1981.

These rulings are being issued under the provisions of Section 177.1(a) of the Customs Regulations (19 CFR 177.1).

(C.S.D. 81–184)

Classification: Covered Safety Pads Affixed to Various Bicycle Parts Are Properly Classified as Parts of Bicycles, Other, in Item 732.42, TSUS

Date: February 14, 1981
File: CLA-2:CO:R:CV
066193 MJ

Your letter of June 17, 1980, requested information on the classification of covered safety pads used on bicycles.

You assert that certain covered safety pads used on bicycles have been improperly classified under the provision for articles not specially

provided for, of rubber or plastics in item 774.55, Tariff Schedules of the United States (TSUS), dutiable at the rate of 8.5 percent ad valorem, and eligible for duty-free treatment under the Generalized System of Preferences (GSP).

The submitted samples are tubular closed cell butyl rubber of various lengths and normally at least one inch in diameter. The surface of the pads is somewhat slick and the pads are cut lengthwise so that they can be wrapped around various parts of the bicycle frame. A vinyl cover is then wrapped around the pad and secured by snap closures. The covered safety pads are designed to prevent injury to a bicycle rider by cushioning the handlebar, the handlebar stem, and the top bar of the frame of a bicycle. The safety pads are required equipment in moto-cross bicycle racing; approximately half are sold for general use.

General Headnote 10 (ij), TSUS, states that "a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." An article is chiefly used on a bicycle if it falls with the class or kind of articles principally or predominantly used as parts of bicycles. See Sturm, *A Manual of Customs Law*, at 521. If an article is dedicated for use as a part, this is significant evidence that the article is chiefly used as a part. *Beacon Cycle and Supply Co., Inc.* v. *U.S.*, 81 Cust. Ct. 46, C.D. 4764 (1978), at 51. An article proposed as a part must also aid in the safe or efficient operation of the main article. An accessory can be a part if it satisfies the requirements of chief use and safe or efficient operation of the main article. *Victoria Distributor, Inc.* v. *U.S.*, 57 C.C.P.A. 76, C.A.D. 979 (1970).

The safety pads are dedicated to use as parts of bicycles. The slit down the side of the pad necessitates the use of the vinyl cover; this combination peculiarly adapts the entirety for use as a part of a bicycle. For example, the pads could not be effectively used as hand-grips, on bicycles or other objects, because of the slickness of their surface and because of the slits. Incidental or fugitive use also does not vitiate this conclusion. The safety pads also aid in the safe or efficient operation of a bicycle by diminishing a rider's risk of injury from a fall, a risk inherent in racing and in casual bicycling. The safety pads do not merely add a convenience, but aid directly in the safe operation of the main article itself.

Under the second clause of General Headnote 10(ij), set forth above, the safety pads, even though considered parts, might be classifiable under the provision for "Expanded, foamed, or sponge rubber or plastics, and articles not specially provided for, wholly or almost wholly, of such rubber or plastics," in item 770.80 TSUS. (The safety pads would fall under the second clause of this provision

because they are articles.) But a basket provision is not specific enough to prevail over a parts provision. *Ideal Toy Corp.* v. *U.S.*, 58 C.C.P.A. 9, C.A.D. 996 (1970). The safety pads are classifiable under the provision for parts of bicycles, other, in item 732.42, TSUS, dutiable at the rate of 15 percent ad valorem.

Products of beneficiary developing countries, including Taiwan, classifiable in item 732.42, TSUS, are *not* eligible for duty-free treatment under the Generalized System of Preferences (GSP). If the safety pads have been classified in item 774.55, TSUS, then they have been eligible for GSP if they were products of beneficiary developing countries. There has been no uniform and established practice for classification of the merchandise. This letter will be circulated to the various ports.

(C.S.D. 81–185)

Application of Coastwise Laws to Outer Continental Shelf Activity: The Use of a Foreign-Built Launch Barge in the Transportation of a Drilling Jacket

Date: February 26, 1981
File: VES–3–15 CO:R:CD:C
104983 JM
104880

This is in response to your letter of December 23, 1980, concerning use of a foreign-built launch barge, alone or in conjunction with a U.S. or foreign-built derrick barge, in the transportation of a drilling jacket to the Outer Continental Shelf of the United States.

You state that the launch barge and/or the derrick barge will deliver the drilling jacket to a point at which no buoy marker is submerged onto or attached to the Outer Continental Shelf and no well has been sunk into the seabed. While there may be buoys or wells in the general vicinity, the barge will not deliver the drilling jacket to any of these sites. You ask whether title 46, U.S. Code, sections 289 and 883, would prohibit this activity.

Title 46, U.S. Code, section 289, provides that no foreign-flag vessel shall transport passengers between points in the United States. Section 883 of title 46 provides, in pertinent part, that "no merchandise shall be transported . . . between points in the United States, including Districts, Territories and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States".

The provisions of section 4(a) of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1333(a), extend the Constitution and laws and civil and political jurisdiction of the United States to "the subsoil and seabed of the Outer Continental Shelf and to all

artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . ."

Because the drilling jacket would be delivered to a point on the Outer Continental Shelf where no device or structure has been attached or erected, there would be no violation of the coastwise laws in the transportation of the drilling jacket by a foreign-built launch barge, alone or in conjunction with a U.S. or foreign-built derrick barge, to the Outer Continental Shelf.

You therefore are correct in your interpretation that our ruling 104880 (circulated as Legal Determination 81–0010) should not be read to state otherwise.

(C.S.D. 81–186)

Classification: Sewing Machines, Telephone Switching Equipment, Emergency Generators, Air Conditioning Equipment and Transformers Are Not Assists Under Computed Value, TAA

Date: February 27, 1981
File: CLA–2 CO:R:CV:V
542302 BS
TAA #18

This is in reference to your letter dated December 1, 1980, in which you requested a ruling under Part 177, Customs Regulations, with regard to a prospective transaction. The facts of the transaction are as follows:

Company A is setting up an off-shore Company ("B") to perform an 807 assembly operation. Company A will supply to Company B the following equipment at no cost: Sewing machines, air conditioning equipment, power transformer, telephone switching equipment, and emergency generator. You advise that Company A uses a generally accepted accounting system and will depreciate the equipment over generally recognized periods.

Based on Headquarter's rulings, it is your opinion that the sewing machines are dutiable assists under section 402(1)(A)(ii), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA). On the other hand, you believe that the remaining equipment would not be considered dutiable assists, nor would their value be includable under any other provision in determining transaction value or computed value.

It is also your opinion that the value of the sewing machines to be includable as an assist would be the depreciated cost taken on the books of the importer at the end of each fiscal year. Thus, e.g., if it is

reasonable to depreciate sewing machines over a 7-year period, and the value of the machines was $7,000, the maximum apportioned value of the assist that would have to be declared to Customs during each year would be $1,000.

Section 402(h)(1)(A) provides as follows:

> (1)(a) the term assist means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dyes, molds and similar items used in the production of the merchandise.
>
> (iii) Merchandise consumed in the production of the imported merchandise.
>
> (iv) Engineering, development, artwork, design work, plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise * * *.

In TAA # 4, dated September 4, 1980 (copy enclosed), we held that general purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at a reduced cost used abroad in the production of merchandise imported into the United States, is dutiable under section 402(h)(1)(A)(ii). Thus, the sewing machines furnished by Company A fall within this provision.

However, since the other items (telephone switching equipment, emergency generator, air conditioning equipment, power transformer) are not used in the production of the merchandise, they cannot be considered assists within the meainng of section 402(h)(1)(A)(ii). Nor do such items fall within any of the other assist categories. We note in this regard that these categories are intended to be inclusive and, accordingly, items not included therein are not considered assists.

The definition for an assist under transaction value is the same when determining computed value, and accordingly, these items are similarly treated. Futhermore, we agree that these items do not fall within any of the additions to the price paid or payable in determining transaction value, nor can they be considered as any of the elements in determining computed value.

One of the basic concepts inherent in the TAA is the use for appraisement purposes of the importer's or supplier's accounting method if such method is in accordance with generally accepted accounting principles. In the "Statement of Administrative Action" the draftsmen stated, with respect to assists:

> Once a value has been determined for the assist * * * it is necessary to apportion that value to the imported merchandise.

> The apportionment of these elements will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment used will depend on the details in the documentation by the importer to substantiate his requested method * * * If the anticipated production using the assist is only partially destined for the United States, or if the assist is used in several countries, the method of apportionment to be used will depend upon the documentation provided by the importer to substantiate the requested method * * *.

In your example, if it is in accordance with generally accepted accounting principles to depreciate the sewing machine over a 7-year period, and the value of the machines is $7,000, Company A's books would reflect a depreciated cost per year of $1,000. This is the amount which would be attributed on an annual basis to the imported merchandise.

Under the circumstances, we hold that where general purpose machinery is includable in transaction value or computed value as an assist, it may be apportioned for Customs valuation purposes on a yearly basis at the depreciation cost reflected on the books of the related domestic importer, assuming the depreciation is determined in accordance with generally accepted accounting principles. Further, air-conditioning equipment, a power transformer, telephone switching equipment and emergency generators do not fall within the definition of assist, as they are not used in the production of the merchandise. Accordingly, unless they are carried on the books of the foreign producer, their cost or value may not be apportioned to the merchandise, and is not includable in transaction value or computed value.

(C.S.D. 81–187)

Classification: Tariff Classification of Oversized Steel Slabs Which Do Not Conform to the Dimensional Requirements Defined in Headnote 3(c), Subpt. B, Pt. 2, Sch. 6, TSUS

Date: March 2, 1981.
File: CLA–2:CO:R:CV:G
065881 LJE

AREA DIRECTOR OF CUSTOMS,
New York, New York

Re Classification of oversized steel slabs or slabs which do not meet the dimensional requirements of the meaning of slabs in Headnote 3(c), Subpart B, Part 2, Schedule 6, TSUS, I/A 233/80.

DEAR SIR: In your memorandum of December 4, 1980 (your file CLA–2–06–SCD–11–CST–18), you requested advise on the above issue as a result of numerous phone calls from other ports and the im-

porting public concerning the lack of a definite ruling for purposes of uniform classification. You point out that several ports have expressed opinions that the subject merchandise should be classified as either ingots, or bars, or plates, or angles, shapes, and sections, all of which are defined in Schedule 6, Part 2, Subpart B.

You discussed the proposed classifications and pointed out that the subject slabs are not within the meaning of ingots because ingots are defined as castings, and these slabs are a hot rolled product. You eliminate the classification of angles, shapes, and sections on the basis that the subject slabs have a cross section in the shape of a rectangle and therefore would be within the meaning of the term bars which are specifically excluded from the meaning of angles, shapes, and sections.

Information received is that much of the production of steel slabs today does not fall within the dimensional requirements for slabs in Headnote 3(c) because they are oversized. You report that a preponderance of oversized slabs produced today meet the wording of the plate definition in Headnote 3(g) as flat rolled products, 0.1875 inch or more in thickness and over 8 inches in width. They do not, however, meet the commercial meaning of plates. You believe, therefore, that the oversized slabs should be classified as bars.

The issue presented is whether the meanings set forth in the headnotes or the commercial meanings shall control.

In *Overton and Co.* v. *United States*, C.D. 4875, decided September 23, 1980, the court in rendering its decision involving an issue between "bars" and "shapes" stated that where the terms have been statutorily defined, such statutory definitions are determinative.

The court then proceeded to address the issue of whether the merchandise fell within the definition of "bars" in Headnote 3(d), and stated that if the subject merchandise was encompassed by that definition, its classification as "shapes" would be precluded by the definition of "angles, shapes, and sections" in Headnote 3(j), which excludes "bars". Guided by the principle of this decision, the statutory definitions of "plate" and "bar" are determinative. Further, since the definition of "bars" in Headnote 3(d) specifically excludes "plates", it is first necessary to address the issue as to whether the oversized slabs are plates within the meaning of Headnote 3(g). See also I.A. 32–76, suppl. 1, 052649.

Applying the reasoning of OVERTON to the situation before us, those oversized slabs which meet the meaning of the term "plates" in Headnote 3(g), must be classified as plates.

We are informally bringing the outdated meaning of the term "slabs" to the attention of the International Trade Commission.

(C.S.D. 81–188)

Vessels: Whether Costs Incurred for the Cleaning of a Vessel's Tanks Are Dutiable Under the Vessel Repair Statute

Date: March 6, 1981
File: VES 13–18
CO:R:CD:C
104938 JL

This ruling concerns the dutiability under 19 U.S.C. 1466 of certain cleaning costs incurred by an American-flag vessel.

Issue: Are costs incurred for the cleaning of a vessel's tanks preparatory to repairs dutiable under the vessel repair statute?

Facts: An American-flag vessel was drydocked in Japan for extensive repairs, including work on its cargo tanks. A charge was made for the cleaning of the vessel's cargo tanks and the removal of slops (cargo residue) and dirty water. The owner claims that the charges, being for tank cleaning, are non-dutiable. The Regional Commissioner proposed to liquidate the charges as dutiable as cleaning preparatory to dutiable repairs.

Law and analysis: The vessel repair statute, 19 U.S.C. 1466, provides for a 50% ad valorem duty on the cost of foreign repairs to American-flag vessels.

CIE 196/60 held that cleaning operations in cargo areas to protect cargo to be carried in the future are not dutiable repairs.

CIE 820/60 held that the cleaning of cargo tanks in preparation for dutiable painting is dutiable as part of the painting.

CIE 1203/60 held that the application of a coating to cargo tanks is analogous to dutiable painting.

An analysis of repair invoices discloses that the vessel underwent extensive repairs in drydock, including having its cargo tanks washed and coated. We note that ten other dutiable repairs to the cargo tanks were involved. It is our opinion that the cargo tanks were cleaned in preparation for, and the charges are dutiable as part of, dutiable repairs.

However, the removal of the slops is a cleaning procedure undertaken to prepare the vessel to receive future cargo, which cost is not dutiable pursuant to the holding in CIE 196/60. Customs has consistently held that where charges for non-dutiable items are not segregated on an invoice, the entire invoice will be liquidated as dutiable. Therefore, unless the petitioner is able to furnish a corrected invoice from the ship-yard which segregates the charges, the entire invoice should be liquidated as dutiable.

Holding: The charges for the cleaning of cargo tanks of an American-

flag vessel in a foreign drydock are dutiable under 19 U.S.C. 1466 when dutiable repairs on the tanks are made following the cleaning. The cost of removing slops, however, is a non-dutiable cost of preparing the vessel to receive future cargo.

(C.S.D. 81-189)

Classification: Proper Tariff Classification of Artificial or Synthetic Surface Ice-Skating Rinks Which Are Also Adaptable to Other Athletic and Recreational Uses

Date: March 9, 1981
File: CLA-2 CO:R:CV:G
061999 LCS
065087 LCS
064525 LCS
064798 LCS

This ruling concerns the Customs classification of artificial/synthetic surface ice-skating rinks, suitable also for other athletic/recreational uses.

Facts: Two separate artificial/synthetic surface ice-skating rinks, one marketed under the trade name "NEWICE" (a product of Belgium) and the other under the registered trade name "GLICE" (a product of Canada), have been presented for classification. Both systems permit the use of traditional-type blade ice skates for figure and recreational skating and hockey.

The former consists of standard panels, each measuring 4 feet by 3 feet in surface area and consisting of a notched plywood core, approximately .75 of an inch in thickness, bonded on each face with a 14-millimeter thickness of high-density polyethylene, both of which are capable of use for skating or other uses. The notched plywood core accommodates a plastic assembly "tongue" which serves to secure the panels one to another. The complete system includes, as well as the panels and assembly "tongues," an underlayment mattress of fiber material, approximately .50 of an inch in thickness, a rubber cushioning material, steel holding guard rails with related hardware, and a liquid coating/lubricating material. In assembly, the underlayment mattress, which compensates for any uneveness of the subsurface, either indoor or outdoor, is positioned and the panels assembled by use of the tongues; the surface is then girded by the rubber cushioning and the steel holding guard rails, after which the liquid lubricant is applied. Normal usage is stated to require reapplication of the lubricant on a 7 to 10 day cycle. However, nonreapplication at the end of a cycle enables use of the surface for nonskating athletic/recreational activities (*e.g.*, basketball, dancing, etc.)

The entire system is assumed to be in chief value of plastics material.

No breakdown by cost or value of the components was provided and no description of the constituent ingredients of the conditioner/lubricant was stated.

The latter of the two specific systems under consideration, "GLICE," consists of: (1) panels, measuring 600 by 800 (assumed to be stated in millimeters), similar to "NEWICE," compromised of a notched core (assumed to be of laminated wood) bonded on each face with a plastics material surface (both of which are capable of use for skating or other uses); (2) plastic assembly rods; (3) a resilient interpolated mattress, such as "Phaltex Isorel," measuring 1.0 to 1.5 centimeters in thickness; (4) a rigid hardwood perimeter frame; and (5) "GLICE" conditioner, a liquid lubricant to reduce friction between the surface and the skate blades.

The assembly procedure is essentially the same as for the "NEWICE" system; however, the conditioner application cycle for the "GLICE" system is stated to recur biweekly.

The entire system is stated to be in chief value of plastics materials. No breakdown by component or value was provided.

Both systems stress the energy conservation, cost (both initial and upkeep), maintenance, multiple-use, and other advantages over regular ice rink systems.

Issue: Whether artificial/synthetic surface ice-skating rinks are classifiable as entireties or separately by individual component; and if an entirety, whether as: (1) ice-hockey equipment; (2) other game, sport, gymnastic, athletic, or playground equipment, and parts thereof, not specially provided for; (3) according to component material in chief value; or otherwise (item Nos. 734.80 and 735.20, Tariff Schedules of the United States (TSUS), noted in particular).

Law and analysis: The resolution of the issue of whether these systems constitute entireties for tariff classification purposes presupposes that the entry or withdrawal from warehouse for consumption of the merchandise which is the subject of the particular entry comprises a substantially complete unit (*i.e.*, one complete ice-skating rink, one-complete ice-hockey rink). In such circumstances, it is well settled that the " * * * separate entities, which by their nature are obviously intended to be used as a unit, * * * [and] to be joined together by mere assembly, and [,] in such use * * * [and] joining [,] the individual identities of the separate entities are subordinated to the identity of the combined entity, * * * [the doctrine of entireties applies and] duty will be imposed upon the entity they represent." *Donalds Ltd., Inc.* v. *United States*, 32 Cust. Ct. 310, C.D. 1619 (1954).

Accordingly, based on the assumption that the substantially complete entity is entered (*i.e.*, arrives at the U.S. port in one conveyance or on the same day, if shipped in more than one conveyance) or, if not arriving as such, is withdrawn from warehouse, both for consump-

tion, the entity (*i.e.*, the subject system) will be treated as an entirety for tariff classification purposes.

In the absence of persuasive evidence that such complete systems are to be chiefly used (or exclusively used) as ice-hockey rinks, the available evidence indicates they are intended primarily for recreational skating and secondarily for other recreational athletic or sports activities. Therefore, complete artificial/synthetic surface ice-skating rinks, capable of and marketed for other nonskating uses, are most properly classifiable under the provision for other game, sport, gymnastic, athletic, or playground equipment, and parts thereof, not specially provided for, in item No. 735.20, TSUS, dutiable as a product of either Canada or Belgium at the reduced column 1 rate of duty of 9 percent ad valorem. C.I.E. 673/66, February 15, 1966, T.D. 56545(15), C.D. 492.23P, October 1, 1965, involving a complete indoor track system, and C.I.E. 2003/66, September 2, 1966, T.D. 66–169(36), T.C. 492.21 I, July 20, 1966, involving matting for cricket games, noted and followed.

Holding: Artificial/synthetic surface ice-skating rinks, consisting of underlayment, plastic surfaced panels, assembly tongues, supporting and/or framing rails, etc., together with the surface conditioner lubricant, imported either as complete units, are classifiable, in the absence of persuasive evidence of a more-restrictive chief or exclusive use as ice-hockey rinks, under the provision for other-game, sport, gymnastic, athletic, or playground equipment, and parts thereof, not specially provided for, in item No. 735.20, TSUS.

Effect on prior rulings: CLA–2:R:CV:MC HL, 053281, November 28, 1977, is hereby overruled. Additionally, insofar as the result herein and the two C.I.E.'s cited as precedent cannot be distinguished from the result in the following two rulings, they are overruled; however, it is believed that these synthetic surfaces are not necessarily chiefly used for recreational purposes even though specific importations may be intended for such use:

(1) R:CV:MA DB, 413.44, 030503, February 7, 1974; and

(2) ORR Ruling 730048, June 12, 1973, R:CV:MA 418.44.F, March 8, 1973.

(C.S.D. 81–190)

Drawback: The Applicability of Drawback Specifications (19 U.S.C. 1313(c)) to Imported Whiskey Claimed To Be 7 or 9 Years Old Rather Than 6 Years Old

Date: March 10, 1981
File: DRA–1–CO:R:CD:D
211730 NK

REGIONAL COMMISSIONER OF CUSTOMS,
Baltimore, Maryland.

Re Request for futher review of protests numbered 1101–9–000171 through 1101–9–000176

DEAR SIR: The following is in reply to your request for futher review of the above-referenced protests.

Issue: Whether a mere claim that imported whiskey was 7 or 9 years old rather than 6 years old is sufficient to prove that the imported merchandise did not conform to specifications for drawback under 19 U.S.C. 1313(c).

Facts: Duty-paid bulk Canadian whiskey was withdrawn from storage of a bonded internal revenue distilled spirits plant and returned to Canada.

Drawback entries were filed for a refund of duties under section 1313(c), title 19, United States Code, claiming that the whiskey did not conform to sample or specifications. The documentation submitted with each entry indicated that the whiskey was imported for bottling because of a strike at the Canadian facility and since the strike had ended, it was required to return the bulk whiskey to Canada.

Since no further documentation was submitted to support the claims that the merchandise imported did not conform to sample or specifications, drawback was disallowed and protests were filed.

The protestant submitted Canadian Customs and Excise documents that show that the whiskey sent to the United States was 6 year old whiskey. The protestant also submitted bottle labels containing a statement that "This Whiskey Is 6 Years Old."

The protestant implies or claims that the whiskey did not conform to specifications because Canadian Customs papers specified 6 year old whiskey whereas the shipments contained 7 and 9 year old whiskey.

Further, the protestant claims that the imported whiskey remained continuously in bond prior to exportation and section 1557(a) title 19, United States Code, mandates a refund of duties paid upon exportation.

Law and analysis: Section 1313(c), title 19, United States Code, in compliance with applicable regulations, provides for a refund of 99 percent of duty paid on imported merchandise upon exportation within certain time limitations when the merchandise does not conform to sample or specifications.

Section 22.32(b) of the Customs Regulations requires that if the goods are claimed to be not in accordance with sample or specifications (as it is claimed in this case), the drawback entry shall be accompanied by a copy of the order for the merchandise, copies of any preliminary correspondence, and the samples or specifications on which the merchandise was ordered, together with a certificate of the actual owner that the sample or specifications submitted are those on which the merchandise was ordered, showing in detail in

352-986 O - 81 - 5

what manner the merchandise does not conform to sample or specifications. The regulations also provide that if no written order was placed and no sample or specifications are available, a certificate of the actual owner setting forth the specifications of his order and the method by which they were communicated to the seller may be accepted.

The protestant did not comply with the requirements of section 22.32(b). The documents filed with the entries indicated that the merchandise was returned to Canada because a strike at the Canadian facility had ended. The claims that the merchandise did not conform to sample or specifications were not substantiated and drawback was properly disallowed.

Nor are we satisfied that the documents submitted with the protests substantiate claims that the merchandise did not conform to sample or specifications. No information was submitted with the protests to show what the foreign shipper intended to send to the United States or what the consignee intended to receive. No information was submitted to show the intended transactions between the shipper and the consignee. The protestant did not submit information to show that 7 or 9 year old whiskey was not acceptable to meet specifications for 6 year old whiskey. In the absence of such information, we must conclude that the merchandise was returned as stated in the documents filed with the entries, because a strike at the Canadian facility had ended.

Section 1557(a), title 19, United States Code, concerns merchandise entered for warehousing in a Customs bonded warehouse. Upon importation the merchandise in question was placed in a distilled spirits plant bonded under the Internal Revenue Code. Since the merchandise was not entered for warehousing in a Customs bonded warehouse, section 1557(a) is not applicable.

Holding: The mere claim that imported whiskey was 7 or 9 years old rather than 6 years old is not sufficient to prove that the imported merchandise did not conform to specifications.

You are directed to deny the protests in full. Your file is returned herewith.

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 81-69)

ARMCO, INC. AND CF&I STEEL CORPORATION, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AH JU STEEL CO., LTD., ET AL., INTERVENORS

Court No. 80-9-01435

MOTION TO DISQUALIFY COUNSEL

1. DISQUALIFYING FORMER GOVERNMENT ATTORNEY

If a former representation by a government attorney is "substantially related" to a current private representation in which he is participating, and if there is reasonable probability that the

privileged information available to said attorney in his former position might be disclosed to associates he is disqualified; although, substantial relationship between two representations is itself sufficient to disqualify him.

2. Firm Disqualification—Screening

When an attorney is found to be disqualified on the basis of prior adverse representation, and he was not screened from participating in a current proceeding that is substantially related to his earlier representation the attorney's firm is also disqualified from participation.

[Motion to disqualify counsel granted.]

(Dated August 4, 1981)

Freeman, Meade, Wasserman and Schneider (*James M. Brachman* and *Beth Ring* at the oral argument and *Jack Gumpert Wasserman* and *Beth Ring* on the briefs for the plaintiffs.

Daniels, Houlihan & Palmeter (*N. David Palmeter* and *Martin J. Lewin* at the oral argument and on the briefs) for the intervenors.

Rivkin, Sherman & Levy (*Saul Sherman* at the oral argument) for Daniels, Houlihan & Palmeter.

Richardson, *Judge:* This is a contested motion by plaintiffs, Armco, Inc. and CF&I Steel Corporation, for an order disqualifying the attorneys for intervenors, Ah Ju Steel Co., Ltd., et al, of Korea, from representing their clients in this action, which challenges the United States International Trade Commission's (ITC) negative determination of injury in an antidumping proceeding [steel nails from Korea].

On April 13, 1979, the Department of Treasury commenced an antidumping proceeding against certain steel wire nails from Korea pursuant to the Treasury Department's authority under the "trigger price mechanism". Under the then applicable antidumping statute the Treasury Department on April 17, 1979, advised the ITC that it had substantial doubt that an industry in the United States was being or is likely to be injured by reason of the importation into the United States of allegedly dumped merchandise. In transmitting this matter to the ITC, the Treasury Department stated: "Some of the information involved in this case is regarded by Treasury to be of a confidential nature. It is therefore requested that the Commission consider all the information provided for its investigation to be for the official use of the ITC only, not to be disclosed to others without prior clearance from the Treasury Department." [1]

On April 20, 1979, the ITC commenced an investigation to determine whether there was a "reasonable indication" that an industry in

[1] 44 Fed. Reg. 24649 (1979).

the United States was being or is likely to be injured by reason of the importation of the steel wire nails. On May 4, 1979, at a public hearing held by the ITC in this investigation, N. David Palmeter, a member of the firm of Daniels, Houlihan & Palmeter (Daniels' firm) appeared and testified on behalf of intervenors in this action.

Martin J. Lewin, an attorney presently with the Daniels firm is participating in this litigation. Lewin was employed by the ITC as a staff legal assistant from December 11, 1978, to January 11, 1979, when he became an Attorney Adviser to Commissioner Paula Stern, an economist, and continued such employment until June 1, 1979, when he joined the Daniels firm. He stated that while he was Attorney Adviser to Commissioner Stern during the preliminary investigation, he sent resumes to several Washington, D.C. law firms active in the trade area, and on May 9, 1979, he was interviewed at the Daniels firm, which was his first contact with the firm apart from his scheduling the interview.

May 10, 1979, according to Lewin's affidavit, he received an offer from said firm which he immediately accepted. On the same day he informed the Commissioner and it was agreed he should not assist her or otherwise participate in any aspect of any matter before the ITC in which the Daniels law firm was involved. He said that "To the best of my recollection, my involvement in the inquiry consisted of a brief review of some initial material available to the ITC prior to the ITC's public hearing * * *. I have no specific recollection of the contents of the material reviewed." Lewin also stated that "I had no further involvement whatsoever with the inquiry and did not discuss any aspect of the matter with the Commissioner, her staff or any member or employee of the ITC."

May, 17, 1979, the ITC unanimously determined that there was a "reasonable indication" of injury or likelihood of injury to a domestic industry by reason of the importation of certain wire nails from Korea.

May 19, 1980, the Department of Commerce determined that certain wire nails from Korea were being sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930 (19 U.S.C. 1673).

July 23, 1980 the ITC in a 3 to 2 decision made a Final Determination that there was neither material injury nor threat of material injury to American industry resulting from the importation of Korean nails. Plaintiffs appealed said Final Determination to this Court.

February 27, 1981, Martin A. Lewin, on behalf of the Daniels firm, counsel to Korean nail intervenors, signed and filed with this court, a motion for access to confidential documents in the investigation which led to the Final Determination under review by this court, under a protective order. Lewin's signing and filing of this

motion in this litigation, prompted plaintiffs' to move for Lewin's disqualification, in view of his prior employment as Attorney Adviser by Commissioner Stern of the ITC, where he had access to confidential information in the preliminary investigation. Plaintiffs also seek the disqualification of the Daniels firm, which through its member, N. David Palmeter, the lead attorney, represented the intervenors in the preliminary investigation, the investigation leading to the Final Determination and is appearing here with Lewin.

The nature of Lewin's position as Attorney Adviser to Commissioner Paula Stern when the preliminary inquiry was in progress, was such that confidential information ordinarily would have been communicated to him.

Lewin in an affidavit and in testimony at the oral argument on the motion to disqualify, stated that he had not at anytime during his employment with the Daniels firm, or prior thereto, "discussed the substance of the inquiry" or any confidential information he had received about the Korean nails while at the ITC, with anyone in the firm. (R. 39)

Lewin, did not deny that he had access to confidential documents. He admits having read certain documents, but says he has "no specific recollection of the contents of the material reviewed" during the preliminary investigation, prior to the ITC's public hearing.

Lewin's counsel stated, at the oral argument, that after Lewin's conference with Commissioner Stern, May 10, 1979, she took him off of the case, and that Lewin left the Commission before it made the investigation for its final determination.

The matters involved in the present litigation (a review of the Final Determination of the ITC), are substantially related to the matters involved in the preliminary investigation when Lewin was an Attorney Adviser to Commissioner Stern. There could be no final determination without a preliminary inquiry to determine if there was "A Reasonable Indication of Injury."

The subject matter, certain steel wire nails from the Republic of Korea, in the preliminary inquiry was the same as in the investigation for the final determination. A reading of excerpts from the two proceedings in 1979 and 1980 clearly reveal the connection:

1. A reading of "Determination of A Reasonable Indication of Injury" in Inquiry No. AA 1921–Inq. –26, at page A–4:

> The products included within the scope of this investigation are brads, nails, spikes, staples, and tacks of one-piece construction which are made of round steel wire and which are (1) less than 1 inch in length and less than 0.065 inch in diameter or (2) 1 inch or more in length, and 0.065 inch or more in diameter, and made of round steel wire, as provided for in items 646.25 and 646.26, respectively, of the TSUS.

2. The Determination of the Commission in Investigation No. 731–TA–26 (Final) under the Tariff Act of 1930, together with the information obtained in the investigation lists the same merchandise, at page 5:

> The Department of Commerce determination of less-than-fair-value sales covers those articles entering the United States under items 646.25 and 646.26 of the Tariff Schedules of the United States (TSUS), which includes brads, nails, spikes, staples, and tacks of one-piece construction, made of round steel wire. TSUS 646.25 provides for these articles which are under 1-inch in length and less than 0.065 inches in diameter. Item 646.26 provides for these articles which are 1-inch or more in length and 0.065 inches or more in diameter.

Also, the Preliminary Determination is referred to at page 13 of the Final Determination where it states:

"In the unanimous preliminary determination *in this case*, the Commission found a "reasonable indication of injury." (Emphasis added). Footnote two which follows this statement gives the precise citation to the preliminary investigation.

19 U.S.C. § 1516a, which provides for Judicial review in countervailing duty and antidumping duty proceedings, in subparagraph (b)(2) Record for Review, requires that the preliminary investigation be included in the file submitted to the court.

Thus the two investigations—the one when Lewin was with the ITC and the one when Lewin was with the Daniels firm, but in which he states he did not participate—are inextricably linked together as a part of this case, and must be considered by this court in deciding the issue of attorney disqualification.

Plaintiffs motion to disqualify Lewin asserts Lewin's representation is in direct contravention of the American Bar Association's Code of Professional Responsibility, Canon 9, and Disciplinary Rules 9–101(B).

Canon 9 states that:

> A lawyer should avoid even the appearance of professional impropriety.

Disciplinary Rule 9–101(b) states that:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The decisions on some motions to disqualify give great weight to the "appearance of impropriety". *General Motors Corporation* v. *City of New York*, 501 F. 2d, 639 (2nd Cir. 1974) in which Irving R. Kaufman, Chief Judge, held that an attorney hired to represent the City of New York in a matter in which said attorney had substantial responsibility while a public employee with the Department of Justice in an antitrust action, gave the appearance of professional

impropriety under Canon 9, which would have to be avoided through the disqualification of the attorney. Chief Judge Kaufman stated further at page 648 that: "Providing a measure of specificity to this general caveat, DR9–101(B) commands:"

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Kaufman, *supra*, in 70 Harv. L. Rev. at 664 wrote that:

> If there was a likelihood that information *pertaining* to the pending matter reached the attorney, although he did not "investigate" or "pass upon" it, * * * there would undoubtedly be an appearance of evil if he were not disqualified. (Emphasis added).

The District Court judge who reached a different result was reversed.

Five years later Jack B. Weinstein, District Judge of the Second Circuit, took the position that "The possibility of an attorney's representation in a given case may give rise to an 'appearance of impropriety' is not enough to disqualify." *Society For Good Will To Retarded, Etc.* v. *Carey*, 466 F. Supp. 722, at 724 (1979). The Judge cited *Board of Education of the City of New York* v. *Nyquist*, 590 F. 2d 1241, 1247, (2nd Cir. 1929) where the Court of Appeals receded from its earlier emphasis on the appearance of impropriety as the standard in favor of the taint of trail as the standard. It stated that where "there is no claim that the trial will be tainted, appearance of impropriety is simply a slender reed on which to rest a disqualification order in the rarest cases."

The same Court of Appeals sitting en banc in the case of *Michael F. Armstrong* v. *McAlpin*, 625 F. 2d 433 (1980) *Petition for Cert. Pending*, adhered to its standard that the test is whether the trial would be tainted if a counsel complained against were not disqualified.

The Court does not have to rely on the appearance of impropriety alone in this case to disqualify Lewin. Lewin had substantial responsibility over the subject matter of this litigation, Korean wire nails, while a government employee as attorney adviser to Commissioner Stern. He admitted that he had access to confidential documents in the matter during the preliminary investigation. It has been shown above that the matters embraced within this case were substantially related to matters before the ITC when Lewin was Attorney Adviser to one of the commissioners. The plaintiff does not need to show more. See: Edward Weinfeld, District Judge in *T. C. Theatre Corp.* v. *Warner Bros. Pictures*, 113 F. Supp. 365 at 268 (1953). The Court holds that Lewin is disqualified from participating in this litigation by virtue of his having received privileged information as a government employee with the ITC which was unavailable to plaintiffs.

Since Lewin is disqualified in this case the question of whether

his disability to continue is imputed to the Daniels firm must be addressed.

The American Bar Association Disciplinary Rule 5–105(D) extends every disqualification of a lawyer to all affiliated lawyers in his firm. When this rule is considered in connection with Disciplinary Rule 9–101(B) which prohibits a former government lawyer from accepting "private employment in a matter in which he had substantial responsibility while he was a public employee," the disqualification of an entire law firm is required. To mitigate some of the harsh effects of this Rule, the American Bar Association Ethics Committee issued formal opinion number 342 which permits a law firm to continue in a case where the disqualified member of the firm has been screened and effectively isolated from participation in the particular matter or sharing in its fees. If the law firm has not screened the disqualified attorney, the firm may not continue in the case. The lead counsel in the Daniels firms, Palmeter, stated on the stand at the oral argument that he had not received any confidential information from Attorney Lewin, that his law firm was a small firm and for that reason the firm had not screened Lewin from the case. It doesn't matter whether confidences were in fact imparted by Lewin to the Daniels firm. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification. *Trone* v. *Smith*, 621 F. 2d 994, 998 (9th Cir. 1980); *The NCK Organization Ltd.* v. *Bregman*, 542 F. 2d 128, 132–34 (2nd Cir. 1976); *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F. 2d 1311, 1318 (7th Cir. 1978); *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976); See, the comment on Firm Disqualification in 55 *St. Johns Law Review* 346.

When lead counsel, Palmeter, stated that Lewin was not screened, the exception provided in rule 342 became unavailable, and the Daniels law firm must be disqualified.

Both Attorney Lewin and his law firm, Daniels, Houlihan & Palmeter, are disqualified and cannot continue in this case as attorneys for intervenors.

(Slip Op. 81–70)

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 81–4–00375

QUOTA ON WOOL SWEATERS

[Judgment for plaintiff.]

(Decided August 5, 1981)

Rode & Qualey (*Micheal S. O'Rourke* and *Patrick D. Gill* on the briefs) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Branch Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs); *Pamela Breed*, Deputy Assistant General Counsel, Enforcement and Litigation, Department of Commerce; for the defendants.

Daniels, Houlihan Palmeter, P.C. (*Michael P. Daniels* and *Martin J. Lewin* on the briefs) for American Importers' Association, Textile and Apparel Group, *amicus curiae*.

RAO, *Judge*: Plaintiff, an importer of 100% Shetland wool full-fashioned ladies sweaters from the People's Republic of China (hereinafter PRC), contests the exclusion of its merchandise from entry by the Customs Service pursuant to a quota established for the merchandise by the Committee for the Implementation of Textile Agreements (hereinafter CITA). The case is before this court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and plaintiff's opposition thereto.[1] The American Importers Association, Textile and Apparel Group (hereinafter AIA–TAG) appears as *amicus curiae*, participating through the filing of briefs and in oral argument. A verified complaint has been served and filed, which defendants have answered.

This case arises under an Agreement Relating to Trade in Cotton, Wool, and Man-made Fiber Textiles and Textile Products between the United States and the PRC (hereinafter the Agreement) on September 17, 1980. Although this agreement specified quantitative limits for some categories of textile products to be exported from the PRC to the United States, the category into which the instant merchandise falls (category 446) is unlimited. See Annexes A and B to the Agreement.

Under Paragraph 8 of the Agreement the United States reserved the right to request consultations with the PRC if it believed that imports in any category or categories not covered by specific limits were due to market disruption, threatening to impede the orderly development of trade between the two countries.[2]

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[1] Previously, The Chief Judge of this court had denied plaintiff's motion for a preliminary injunction. *See* Slip Op. 81–47 of May 21, 1981.

[2] The full text of Paragraph 8, which delineates the consultation procedure and the remedies available if no agreement is reached is, because of its relevance to points discussed *infra*, set out in its entirety here:

8. (a) In the event that the Government of the United States believes that imports from the People's Republic of China classified in any category or categories not covered by Specific Limits are, due to market disruption, threatening to impede the orderly development of trade between the two countries, the Government of the United States may request consultations with the Government of the People's Republic of China with a view to avoiding such market disruption. The Government of the United States of America shall provide the Government of the People's Republic of China at the time of the request with a detailed factual statement of the reasons and justification for its request for consultation, with current data, which in the view of the Government of the United States of America shows

(1) the existence or threat of market disruption, and

(2) the contribution of exports from the People's Republic of China to that disruption.

(b) The Government of the People's Republic of China agrees to consult with the Government of the United States within 30 days of receipt of request for consultations. Both sides agree to make every effort to reach agreement on a mutually satisfactory resolution of the issue within 90 days of the receipt of the request, unless this period is extended by mutual agreement.

(c) During the 90 day period, the Government of the People's Republic of China agrees to hold its exports to the United States of America in the category or categories subject to this consultation to a level no greater than 35 percent of the amount entered in the latest twelve month period for which data are available.

(d) If no mutually satisfactory solution is reached during these consultations, the People's Republic of China will limit its exports in the category or categories under this consultation for the succeeding twelve months to a level of 20 percent for man-made fiber and cotton product categories (and of 6 percent for wool product categories) above the level of imports entered during the first twelve of the most recent fourteen months preceeding the date of the request for consultations.

On October 18, 1980 the United States requested consultations with the PRC with regard to category 445/446 merchandise. A notice of the request was published in the Federal Register on October 27, 1980 (45 Fed. Reg. 70960). These consultations did not result in agreement, and the United States proceeded to establish import restraint levels. CITA, which was empowered by Executive Order 11651 of March 3, 1972, as later amended, to supervise the implementation of all textile trade agreements, established an import restraint level of 183,706 dozen sweaters.[3]

On January 19, 1981 CITA published a notice in the Federal Register (46 Fed. Reg. 5033–4) directing the Commissioner of Customs to prohibit, effective January 19, 1981, for the period from October 19, 1980 through January 16, 1982, entry into the United States for consumption of wool sweaters in categories 445/446 produced or manufactured in the PRC exported on or after October 19, 1980, in excess of 183,706 dozen.

Plaintiff alleges and defendants admit that this quota was filled on February 9, 1981. Imports from the PRC of category 445/446 sweaters have been refused entry into the United States since that date.

The commercial invoices indicate that on September 25, 1980, 8 days after the Agreement was entered into by the PRC and the United States, plaintiff ordered approximately 1815 dozen sweaters, described as ladies 100% Shetland wool, 5 gauge, from various manufacturers in the PRC, and on October 15, 1980 it ordered an additional 1,000 dozen. This merchandise was exported on January 18, 1981[4] and on January 24, 1981.[5] Plaintiff attempted to enter the merchandise subsequent to February 9, 1981, the date on which the quota was filled, but the Customs Service refused to permit the importations to enter. The merchandise was, and continues to be, stored in a bonded warehouse. Plaintiff subsequently filed timely protests (Nos. 1001–1–002938, 1001–1–002939, 1001–1–002940 and 1001–1–002941), protesting Customs' refusal to release, and the exclusion of, the merchandise into the United States. These protests were denied by the Customs Service and this civil action timely followed. Protest No. 1001–1–003596 is hereby dismissed as untimely as it was not denied until after April 13, 1981, the date on which summons 81–4–00375 was filed.

It is plaintiff's position that its merchandise was wrongfully denied entry because CITA miscalculated the restraint level (quota) at

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[3] According to the pleadings and briefs, this figure was arrived at by combining the restraint level for the 90-day consultation period and the succeeding 12-month period, based on the formulae contained in the Agreement, Paragraph 8(c) and 8(d).

[4] Entries 81831758-7, 81831764-2, and 81831765-5.

[5] Entry 81831759-0 and 8183175-4.

183,706 dozen sweaters and because CITA erred in concluding that importations of categories 445/446 merchandise from the PRC, between the period of time between September 17, 1980 and October 18, 1980 were causing market disruption, or threat of market disruption, based on the data then available to it with reference both to imports and to domestic production.

Defendants, through their motion to dismiss, bring into question this court's jurisdiction over this controversy, specifically denying that plaintiff has stated a claim as to which relief may be granted. Additionally, defendants contend that this court lacks jurisdiction in this matter because it involves foreign policy considerations and the conduct of foreign affairs. The court disagrees with both contentions.

I

The Customs Courts Act of 1980, Pub. L. 96–417, October 10, 1980, 94 Stat. 1727, not only restated the preexisting jurisdiction of this court, but also specifically provided that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for * * * embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(3).

This court has previously considered the scope of this provision with respect to quotas in *Wear Me Apparel Corp.* v. *United States*, ET AL., I CIT —, Slip Op. 81–22, 511 F. Supp. 814 (March 10, 1981), wherein it said:

> However, section 1581(a) is not the only jurisdictional provision applicable here. * * *
>
> * * * * * * *
>
> Section 1581(i), as explained by the House Committee on the Judiciary (H.R. Rept. No. 96–1235, supra at 47), provides a broad "residual grant of jurisdictional authority * * * to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade * * * [and] makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade."
>
> Given the fact that the claims as to which a protest has been filed directly concern an import quota, these claims obviously arise "out of * * * [a] law * * * providing for * * * quantitative restrictions on the importation of merchandise." In that circumstance, section 1581(i)(3) specifically grants this court jurisdiction to entertain these claims.
>
> Moreover, since these claims involve the administration and enforcement of quantitative restrictions, section 1581(i)(4) also provides jurisdiction. [15 Cust. Bull. No. 14 at pp. 30–1.1.]

Defendants have conceded that this court has jurisdiction pursuant to 28 U.S.C. 1581(a), but only to the extent that this court could determine whether the Customs Service rightfully carried out the instructions of CITA in administering the quota. We conclude that this court has plenary jurisdiction to review the entire matter pursuant to section 1581(i) (3) and (4).

Defendants also address the issue as to whether plaintiff has stated a claim. The verified complaint alleges that plaintiff is the importer of record, that its merchandise was denied entry due to agency action resulting in restraints on the number of sweaters that can be imported from the PRC, that it has been injured by this agency action in that it is losing sales on this merchandise and related sales on other merchandise, that the agency action was based in incorrect or incomplete data, and plaintiff prayed for specific and general relief. Considering the fact that the Customs Courts Act of 1980 was enacted in part to provide relief for importers aggrieved by agency action in one forum, this court concludes that plaintiff's complaint sufficiently states a cause of action.

Defendants also contend that plaintiff is attempting to interfere with the proper function of the Executive in foreign policy matters, and that the United States will be hindered in its further negotiations with the PRC relative to the Agreement and other matters if plaintiff is given the relief it seeks. However, plaintiff's sweaters have already been exported from the PRC and the irrevocable letters of credit have already accrued to the benefit of the PRC manufacturers. The impact of permitting or denying entry to plaintiff's merchandise will be felt by it alone and will have little or no bearing on further negotiations, either to expand or restrict the number of sweaters in categories 445/446 permitted entry into this country.

This court recognizes that actions of the President with respect to the negotiation, and the signing of treaties and foreign agreements are beyond its review. *Cf. William A. Foster & Co. (Inc.) et al.* v. *United States* 20 CCPA 15, T.D 45673 (1932), and generally, Sturm, *Customs Law and Administration*, § 60.2. However, it can be hardly concluded that CITA rises to the power and authority conferred on the President by the Constitution and by Congress. Absent a clear mandate from Congress that CITA's actions are to be vested with the mantle of Presidential immunity from judicial review, this court concludes that Congress did not intend to extend the President's protective shield to cover CITA's actions.

Additionally CITA's action in determining that consultations with the PRC were necessary with respect to categories 445/446 were more administrative than foreign policymaking . To arrive at a belief that there was market disruption or the threat of market disruption,

CITA had to evaluate import data and the state of the domestic industry. If those actions or determinations were not based on sufficient data or if incorrect conclusions were drawn from such data and plaintiff was injured as a result, review of CITA's determinations by this court is proper.

II

Pursuant to section 8 (a) of the Agreement, a condition precedent to a request for consultations by the Government of the United States with the Government of the PRC is a belief that imports from the PRC are threatening to impede the orderly development of trade between the two countries due to market disruption.[6] The term "market disruption" is not defined in the Agreement, but the parties have agreed that the definition of the term provided in Paragraphs I and II of Annex A of the Arrangement Regarding International Trade in Textiles commonly known as the Multifiber Agreement (hereinafter MFA), 39 Fed. Reg. 13308, 13311 (April 12, 1974), is applicable.[7] Market disruption, according to the MFA, must be based on the existence of serious damage to domestic producers or actual threat thereof caused by (1) a sharp and substantial increase or imminent increase of imports of particular products from particular sources and (2) the offering of these products at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country.

The detailed factual statement which the United States was required to provide to the PRC with the request for consultations pursuant to section 8(a) of the Agreement did not establish the second of these factors. Its findings of offerings of "these products" related to all women's wool sweaters, not ornamented, in the middle value range classifiable under TSUS item 382.5871, but there is no indication that the domestic merchandise compared was "similar goods of comparable quality."[8] Indeed, it appears that what was compared was all women's wool sweaters, not ornamented, valued over $5 per pound, produced in the United States. A valid comparison was not made.

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[6] See note 2, *supra*.

[7] See, particularly, defendants' brief filed April 21, 1981, pp. 37–45.

[8] Market Statement to China of October 7, 1980:

"* * * The women's wool sweaters imported from China under TSUSA 382.5871 are in the middle value range among the major foreign suppliers but below the U.S. price (see table 5).

TABLE 5.—*Import values and domestic price (U.S. dollars per dozen)*

[TSUSA No. 382.5871—Women's wool sweaters, not ornamented, valued over $5 per pound]

China	$81.65
Taiwan	77.10
Hong Kong	100.45
United States	151.20

NOTE.—Import values based on C/F duty-paid values.

It therefore becomes unnecessary for this court to decide whether CITA should have considered those factors indicating the existence of damage, such as turnover, market share, profits, export performance, employment, etc., enumerated in Paragraph I of Annex A of the MFA as contended by plaintiff and *amicus curiae* or whether, as contended by defendants, those factors are relevant only to the existence of actual damage rather than the threat of damage. The finding by CITA of threat of market disruption in this case is unsupported by sufficient data.

III

Plaintiff also contends that the formulae utilized to arrive at the restraint level were improperly applied. This court finds that in arriving at a quota of 183,706 dozen sweaters, CITA improperly combined the restraint levels established during the 90-day consultation period pursuant to section 8(c) and that established by section 8(d) of the agreement if the parties could not agree during the consultation period, and improperly imposed the restraint level retroactively to October 19, 1980, the date of the receipt of the request for consultation by the PRC.

Section 8(d) of the Agreement provides that if no mutually satisfactory solution is reached during the consultations, the PRC will limit its exports in the category or categories under the consultation *for the succeeding twelve months* to a level of 6 percent for wool product categories above the level of imports entered during the first twelve of the most recent fourteen months preceding the date of the request for consultations. It does not even impliedly permit the combination of this restraint level with that provided for in section 8(c) which is applicable during the 90-day consultation period, nor does it permit retroactive application of the restraint level to the date of receipt of the request for consultations by the PRC.

Defendant argues that plaintiff has no standing to question the terms of a trade agreement with a foreign country and that this court lacks jurisdiction to interpret the terms of trade agreements. The short answer to both these arguments is that plaintiff seeks, not to vary or question the terms of the agreement, but to review the actions of CITA, a government agency with specific delegated authority and duties, in implementing a restraint level on merchandise based on its (CITA's) interpretation of the meaning of the terms of that Agreement.[9] That this court has jurisdiction to review agency action which impacts on imports is well settled.

It is, therefore, the decision of this court that within 90 days CITA

[9] CITA comes within the definition of governmental agency as "a subordinate creature of federal, state or local government created to carry out a governmental function or to implement a statute or statutes." *Blacks Law Dictionary*, 1979.

shall issue a new determination after a re-evaluation of the data on which it based its findings of threat of market disruption. If, on reconsideration of all pertinent data, CITA finds that threat of market disruption, did in fact exist at the time it requested consultations with the PRC under the Agreement, it shall recalculate the restraint level in conformance with the holding in this case and give it prospective application from the end of the consultation period, that is, from January 19, 1981.

Since plaintiff attempted to enter its merchandise for consumption on February 18, 19, 26, and 27, 1981, a period during which the quota would have been open if it had not been applied retroactively, it is further adjudged that plaintiff's merchandise should be released. It is therefore ordered and adjudged that the Customs Service release the plaintiff's merchandise the subject of this claim with the exception of the merchandise the subject of Protest No. 1001–1–003596, which is untimely, from bonded warehouse and permit it to enter the stream of commerce of the United States.

Defendant's motion to dismiss is denied.

(Slip Op. 81–71)

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (A.K.A. COMPACT) ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 81–3–00258

ORDER

(Dated August 5, 1981)

MALETZ, *Judge*: Upon consideration of (i) defendant's motion that the court suspend discovery by entering an order to the effect that discovery in this case, beyond disclosure of the administrative record, not be conducted until a decision is rendered by this court in *Zenith Radio Corp.* v. *United States*, Civil Action 80–5–00861; (ii) plaintiffs' opposition thereto; (iii) plaintiffs' crossmotion for a discovery conference; and (iv) defendant's opposition thereto, it is hereby ordered:

1. That the administrative record filed in *Zenith*, *supra*, shall be made available to counsel for plaintiffs, pursuant to a protective order, within 15 days after the date of this order;

2. That defendant's motion to suspend discovery is denied. As to this, the court notes that plaintiffs' first request for discovery does not require any new search by defendant of its files but rather re-

quires the reproduction of those documents already identified and made available to counsel for plaintiff in *Zenith*. Given this circumstance, discovery here, even though duplicative of discovery already carried out in *Zenith*, does not in the court's view constitute such a clear case of hardship or inequity on defendant as to warrant a stay of discovery. See, e.g., *Landis* v. *North American Co.*, 299 U.S. 248, 255 (1936); *United Refining Co.* v. *Department of Energy*, 486 F. Supp. 99 (W.D. Pa. 1980).

3. That plaintiffs' motion for a discovery conference is granted and such conference shall be held on Thursday, September 3, 1981, at 2:30 P.M. in the chambers of the undersigned.

(Slip Op. 81–72)

ZENITH RADIO CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–5–00861

Memorandum and Order

(Dated August 6, 1981)

MALETZ, *Judge*: Defendant has filed a motion pursuant to rule 37 to impose sanctions upon plaintiff in the form of an order providing (i) that the judgment in defendant's favor be entered on the allegations contained in paragraphs 32, 33, 34, 35 (3rd through 5th sentences), and 36 of plaintiff's First Amended Complaint; and (ii) that plaintiff shall within 14 days pay to defendant the sum of $4.79 million. The basis of the motion is this. Plaintiff originally advanced an objection based on prematurity in response to several of defendant's first interrogatories. Defendant alleges that this objection consisted of a deliberate falsehood interposed solely for delay and for the purpose of concealing the lack of substance in plaintiff's case on the merits and that the sanctions sought are thus appropriate.

Upon consideration of defendant's motion; plaintiff's memorandum in opposition to such motion; and defendant's reply to plaintiff's memorandum in opposition, it is hereby ordered that defendant's motion for sanctions pursuant to rule 37 be denied for the following reasons:

First, sanctions pursuant to rule 37(b) may be imposed only where, unlike the situation here, the court has issued a discovery order and that order has been violated. See, e.g., *Schleper* v. *Ford Motor Co.*, 585 F. 2d 1367, 1371 (8th Cir. 1978); *Fisher* v. *Marubeni Cotton Corp.*, 526 F. 2d 1338, 1341 (8th Cir. 1975); *Britt* v. *Corporacion*

Peruana de Vapores, 506 F. 2d 927, 932 (5th Cir. 1975); 8 Wright & Miller, *Federal Practice and Procedure*, §§ 2282; 2289 (1970).

Also, rule 37(c) does not authorize sanctions here. That provision is applicable only where there has been a serious or total failure of a party to respond to interrogatories—a circumstance not present here. See, e.g., *Laclede Gas Co.* v. *G. W. Warnecke Corp.*, 604 F. 2d 561, 565 (8th Cir. 1979); *Fox* v. *Studebaker-Worthington, Inc.*, 516 F. 2d 989, 995 (8th Cir. 1975); 8 Wright & Miller, *supra*, § 2291. See also *Sigliano* v. *Mendoza*, 642 F. 2d 309, 310 (9th Cir. 1981).

Further, in the court's view, defendant has not shown that the objection of prematurity which plaintiff originally advanced with respect to defendant's first interrogatories consisted of a deliberate falsehood.

(Slip Op. 81–73)

OLD REPUBLIC INSURANCE COMPANY, PEERLESS INSURANCE COMPANY AND INSURANCE COMPANY OF NORTH AMERICA, PLAINTIFFS *v.* WINSTON E. PITMAN, DISTRICT DIRECTOR OF CUSTOMS, MIAMI, FLORIDA: GEORGE J. MCMANUS, DISTRICT DIRECTOR OF CUSTOMS, SAVANNAH, GEORGIA: ROBERT N. BATTARD, REGIONAL COMMISSIONER OF CUSTOMS, MIAMI, FLORIDA: AND THE UNITED STATES CUSTOMS SERVICE, DEFENDANTS

Court No. 81–7–00891

Memorandum and Order on Plaintiffs' Motion for Preliminary Injunction and Defendants' Cross-Motion to Dismiss

[Plaintiffs' motion for preliminary injunction granted; defendants' cross-motion to dismiss denied.]

(Dated August 7, 1981)

Sandler & Travis, Esqs. (*Gilbert Lee Sandler and Robert I. Targ, Esqs.*, of Counsel) for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *Jerry P. Wiskin*, trial attorney), for the defendants.

Barry H. Nemmers, Staff Attorney, for American Importers Association, amicus curiae.

Tompkins & Davidson, esqs. (*Norman C. Schwartz* of counsel) for National customs brokers & forwarders association of America, Inc., amicus curiae.

RICHARDSON, *Judge*: This is an action to review decisions of the District Director of Customs, Miami, Florida, the District Director of Customs, Savannah, Georgia and the Regional Commissioner

of Customs Miami, Florida, refusing to honor bonds issued by plaintiffs' surety companies in conjunction with entries of merchandise into the United States through the Miami and Savannah Customs Districts, without a notice and revocation proceeding described in 31 Code of Federal Regulations (CFR) Section 223.17.

On Monday, July 13, 1981 the District Director of Customs at Miami sent letters to plaintiffs Old Republic Insurance Company and Peerless Insurance Company, and the District Director of Customs of Savannah, Georgia sent an identical letter to plaintiff Insurance Company of North America informing said plaintiffs that:

> The continued disregard of our request for payment on outstanding claims for which you are liable leaves us no alternative but to reject your surety bond on entries filed in this district * * *. This notice will be effective immediately.

Identical letters were sent to eight other insurance companies.

Plaintiffs are on the approved list of sureties issued by the Secretary of the Treasury July 1, 1981, and the rejection of their bonds by the said District Directors, on July 13, 1981, was the first time the Customs Service had undertaken to collect its revenue from alleged delinquent accounts by refusing to honor a customs bond approved by the Secretary of the Treasury.

In response to the rejection of their bonds the plaintiffs, Old Republic Insurance Company and Peerless Insurance Company filed a motion for a Temporary Restraining Order and Application for Preliminary Injunction in the United States Court of International Trade which was heard by the Court in New York, July 16, 1981. After hearing plaintiffs' counsel in support of said motion and application, and the defendants' counsel in opposition at 10:00 A.M. on July 16, 1981, the Court on the same day at 4:30 P.M. granted the plaintiffs' motion for a Temporary Restraining Order for ten days, and ordered the defendants to show cause before the Court on July 27, 1981 at 10:30 o'clock, A.M., why a preliminary injunction should not issue.

Since this Court granted the Temporary Restraining Order against Robert N. Battard, Regional Commissioner of Customs and Winston N. Pitman, District Director of Customs at Miami, Florida, July 16, 1981, the Regional Commissioner, on July 24, 1981, notified the ten affected surety companies within the Miami Region that "the U.S. Customs Service will not take any action to reject surety bonds pending the outcome of a final decision issued by the Court of International Trade." This representation to the sureties does not render the question on injunctive relief moot, inasmuch as the Regional Commissioner still claims authority to reject bonds. A moot question is not one that ebbs and flows as the tide, but one that does not present the possi-

bility of a recurrence. Also, the Miami situation has had repercussions in ports in other regions not under Commissioner Battard's jurisdiction, including New York City, San Francisco, California, and Union, New Jersey; and plaintiffs furnish surety bonds in a number of ports throughout the United States.

Also, on July 24, 1981, plaintiffs filed a Motion to Change Place of Hearing from New York, N.Y. to Miami, Florida, and the defendants responded that they had no opposition to a changed place of hearing, but requested that the Temporary Restraining Order be extended ten days from July 27, 1981 to August 6, 1981.

Chief Judge Edward D. Re, in accordance with 28 U.S.C. § 253(b) and 256(a) and Rule 77(c)(2) of the Rules of the United States Court of International Trade, designated Miami, Florida as the place of hearing on the motion for a Preliminary Injunction on August 6, 1981.

Plaintiff's pending Motion to Amend its Verified Complaint to include Insurance Company of North America as a party plaintiff, as it had received a bond rejection letter from George J. McManus, District Director of Customs at Savannah, Georgia; and to join said District Director as a party defendant, was granted over defendants' objection, before the hearing on the motion to grant a Preliminary Injunction began.

After the commencement of the hearing on the Motion for a Preliminary Injunction, the Court inquired of counsel if there was any objection to consolidating the hearing with a trial on the merits in accordance with Rule 65(a)(2). Counsel for plaintiffs agreed to do so, but since counsel for defendants stated that he was opposed, as he was not prepared for a trial on the merits, the Court did not order a consolidation.

Jurisdiction

This Court has jurisdiction over the parties and subject matter of the above-styled cause pursuant to 28 U.S.C. 1581(i)(4).

The Plaintiffs are entitled to bring the above-styled cause pursuant to 28 U.S.C. 2631(i).

This Court is empowered pursuant to 28 U.S.C. 2643(c)(1) to grant the relief requested by the Plaintiffs.

Preliminary Injunction

Have the plaintiffs made the requisite showing for the issuance of a preliminary injunction?

The factual information pertinent to plaintiffs' motion for a preliminary injunction in set forth in their Amended Verified Complaint

and the evidence adduced at the hearing on the Motion for a Preliminary Injunction, August 6, 1981.

Plaintiffs contend that as a result of defendants' rejection of their bonds they were barred from writing any new single entry bonds in the Miami and Savannah Districts and thus were virtually put out of business there until the issuance of the Temporary Restraining Order. Plaintiffs' witness, Lowell A. Welnak of Keene, New Hampshire, Vice-President for Claims of Peerless Insurance Company for ten years, and Gerson M. Joseph, a licensed customhouse broker and a member of the Florida Brokers Association, who uses Peerless Insurance Company's surety bonds through said company's agent in Florida, Loren Brokerage, in their testimony supported this contention of plaintiffs.

The defendant did not call any witnesses, and relied on its Memorandum with extensive citations in opposition to plaintiffs' Motion for a Preliminary Injunction filed August 5, 1981.

The witnesses testified that the only notice that they received from defendants was a bar notice of July 13, 1981, informing them that effective immediately they could no longer write bonds in the district by reason of their alleged delinquency in making payment on some outstanding entry accounts.[1] Plaintiffs say that this action is illegal and violative of procedural due process, citing the fifth amendment to the Federal Constitution, a number of statutory and Code of Federal Regulations provisions including 19 U.S.C. 1623 and 31 Code of Federal Regulations (CFR) 223.17.

It is the defendants' position that they have a right to refuse to accept plaintiffs' bonds based upon their record of non-payment, citing 19 U.S.C. 1623(b)(2) and 19 CFR 113.14, 113.15.

Plaintiffs respond by asserting that they have never refused to pay due bills, have not been sued therefor by the Government upon any of their bonds, that their names appear on the current list of approved bonding companies promulgated by the Treasury Department on July 1, 1981, and further, that defendants only recourse against plaintiffs is by way of litigation upon the bonds, or by appropriate proceedings before the Treasury Department for the revocation of their bonding privileges.

The Court's jurisdiction in this case is invoked under 28 U.S.C. 1581(i)(4), which is the broad, residual grant of power to the Court to adjudicate controversies arising in the administration of customs laws and regulations. Bonding practice is an important part of the customs administrative machinery that exists for the protection and

[1] This directive was modified by virtue of an announcement made by Government counsel in open court to the effect that defendants had postponed suspension of plaintiff's bonding privileges in the district until August 3, 1981.

collection of the Government's revenue. And Congress, under a broad, enabling statute, has conferred authority and responsibility therefor upon the Secretary of the Treasury ("Secretary"). See 19 U.S.C. 1623. Section 1623 deals both with bonds which are not specifically required by law as well as with bonds which are required by law, regulation or instruction of the Secretary to the Customs Service ("Service").

Section 1623(b)(2) on which defendants' counsel relies provides that when a bond is required or authorized by law, regulation, or instruction which the Secretary or the Service is authorized to enforce, the *Secretary* may provide for the approval of the sureties on such bond without regard to any general provision of law. Thus, the current list of approved sureties to which plaintiffs call attention is undoubtedly a manifestation of the *Secretary's* exercise of this statutory power.

Sections 113.14 and 113.15 of 19 CFR on which defendants' counsel also rely deal with bonding powers which the *Secretary*, under the enabling authority of section 1623, has delegated to the district director. Section 113.14 describes and enumerates various types of bonds which may be *executed*, subject to approval of the district direct, among which are:

> (g) *Immediate Delivery and Consumption Entry Bond*—(1) *Single entry bond, Customs Form* 7551. Immediate Delivery and Consumption Entry Bond (Single Entry), Customs Form 7551, in the amount equal to the value of the articles, as set forth in the entry, plus the estimated duty (including any taxes required by law to be treated as duties) and the estimated amount of any other taxes imposed upon or by reason of importation, as determined at the time of entry * * *.

And section 113.15 provides that the district director may approve any of the bonds described in section 113.14 if he is satisfied that the *amount of the bond is sufficient*, and it is in *proper form*. Obviously, this regulation is derivative of the Secretary's enabling authority under section 1623(b)(1) to *prescribe the conditions and form of such bonds* and *fix the amount of the penalty*. Customhouse broker, Gerson M. Joseph, testified that up until July 13, 1981 the only thing the Customs Service did with surety bonds was to approve or disapprove them as to form and amount required.

31 CFR 223.17 and 223.18 on which plaintiffs rely deal with revocation of a surety's certificate of authority, and are also manifestations of the *Secretary's* exercise of section 1623(b)(2) power. Section 223.17 provides that whenever it appears that a company (surety) is not complying with the regulations, the *Secretary* will (1) notify the company of the facts or conduct which indicate such failure, and provide opportunity to the company to respond, and

(2) provide opportunity to the company to demonstrate or achieve compliance with the requirements.

The regulation further provides that the *Secretary* shall revoke a company's certificate of authority with advice to it if (1) the company does not respond satisfactorily to his notification of non-compliance, or (2) the company fails to demonstrate or achieve compliance after having been provided an opportunity to do so.

And, insofar as Customs bonding practice is concerned, the revocation proceeding described in section 223.17 is set into motion in accordance with the provisions of section 223.18 which mandates that the company promptly *honor its bonds*. Section 223.18 provides [(a)] if an agency's (district director) demand upon a company (surety) for payment of a claim against it is not settled to the agency's satisfaction, and the agency's review of the situation thereafter establishes that the default is clear and the company's refusal to pay is not based on adequate grounds, *the agency may make a report to the Secretary*, including (1) a copy of the bond, (2) the basis for the claim against the company, (3) a chronological resume of efforts to obtain payment, (4) a statement of reasons offered for non-payment, and (5) a statement of the agency's view in the matter.

The regulation further provides [(b)] on receipt of the report the Secretary, if the circumstances warrant, will notify the company concerned that the agency report may demonstrate that the comapny is not keeping and performing its contracts, and that, in the absence of satisfactory explanation, the company's default may preclude the renewal of the company's certificate of authority.

It is clear from the foregoing that the Secretary of the Treasury has reserved unto himself the power to terminate a surety's privilege to write bonds in connection with customs matters while delegating to the district director only the power to approve the form and amount of the bonds—thus affording the latter official no local option for resolving disputes arising from bond matters at variance with the reserved power, or to set himself up as the final arbiter of disputes that he is involved in with sureties over alleged delinquencies in payments. There is no question but that a refusal on the part of a district director to accept customs entries with plaintiff's bonds accompanying them, whether acting on his own or under the direction of a regional commissioner of customs, cannot be interpreted as the exercise of a section 1623(b)(1) power to approve the form or amount of a bond, but is in fact an act of *finality* which invades a section 1623(b)(2) power with grave consequences attached to it.

Nothing can disturb the confidence of an importing public faster or with more certainty than the knowledge, or even a mere suggestion that a surety on the public's bonds lacks the financial stability

that the public was led to believe it possessed when engaged. Obviously, therefore, it was to guard against such an event that the Secretary chose to preside over events influencing the exercise of such devastating power, and then only after shepherding these events through a carefully detailed procedure designed to accord the surety protection of a valuable property right safeguarded by constitutional due process.

On the basis of the papers before the court, the testimony of plaintiffs' witnesses and the arguments of counsel it clearly appears that at the time the bar order went out a dialogue was in progress between plaintiffs and defendants relative to verification of plaintiffs' liability with respect to particular entries from among a mass of entry data on computer print-outs.

While the defendants did not present any witnesses, it appears to the court from argument by Government counsel, Mr. Wiskin, that there is room for improvement on plaintiffs' part of business methods calculated to make prompt and ready identification of their entry and bond responsibilities—a fault which may well have exacerbated the situation and led to understandable frustration on the part of customs officials in the district. There is nothing before the court to indicate that plaintiffs were in *default* on any of the bonds or had *refused* to make payment under any of them, or that defendants had filed a delinquency report on plaintiffs with the Secretary of the Treasury to invoke a section 223.18 proceeding against then.

The Court is, therefore, convinced that plaintiffs have shown the requisite injury and clear legal right to relief which is not counterbalanced by any showing of injury or loss to the Government, whose remedies remain fully intact. Consequently, there is no need to require the plaintiffs to give security, and the defendants' motion that the plaintiffs be required to furnish a bond in the amount of defendant's unsettled claims is denied.

The Order granting the plaintiffs' motion for a preliminary injunction is attached to this memorandum.

ORDER

This proceeding having been regularly brought on for hearing Thursday, August 6, 1981, in Miami Florida, pursuant to the motion of the plaintiffs for a Preliminary Injunction against the defendants for the purpose of enjoining them from refusing to honor the surety bonds issued by the plaintiffs, Old Republic Insurance Company, Peerless Insurance Company, and Insurance Company of North America in connection with entries of merchandise into the United States through the Miami, Florida and Savannah, Georgia Customs Districts; and the Court having heard and considered the evidence adduced, the arguments pre-

sented as well as the memoranda submitted by counsel, the Court doth conclude that the rejection of plaintiffs surety bonds on entries filed in the Districts of Miami and Savannah by the District Directors, dated July 13, 1981, without prior notice and opportunity for hearing as required by 31 CFR 223.17 will cause irreparable harm, injury, loss, and damage, in that it forces members of the importing public who are customers of plaintiffs to seek alternative sources for purposes of obtaining surety bonds on importations, with the possible permanent loss of such customers by the plaintiffs, and that plaintiffs are likely to prevail on the merits. Therefore, it is:

ORDERED ADJUDGED AND DECREED that Winston E. Pitman, District Director of Customs, Miami, Florida; George J. McManus, District Director of Customs, Savannah, Georgia; Robert N. Battard, Regional Commissioner of Customs, Miami, Florida; and the United States Customs Service, together with their agents, servants, employees and representatives under the direct or indirect control of said Defendants, are hereby preliminarily enjoined from.

1. Refusing to honor surety bonds issued by the plaintiffs, OLD REPUBLIC INSURANCE COMPANY, PEERLESS INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA in conjunction with entries of merchandise into the United States through the Miami and Savannah Customs Districts, or any other Customs District.

2. Engaging in any conduct that results in the surety bonds issued by the plaintiffs, OLD REPUBLIC INSURANCE COMPANY, PEERLESS INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA being dishonored with regard to any entries of merchandise made into the United States through the Miami and Savannah Customs Districts, or any other Customs District.

3. Revoking, withdrawing, or cancelling the status of OLD REPUBLIC INSURANCE COMPANY, PEERLESS INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA as sureties approved by the Secretary of Treasury to issue surety bonds with regard to entries of merchandise into the United States through the Miami and Savannah Customs Districts, or any other Customs District.

4. Implementing any of their directives or policy statements that result in the surety bonds of OLD REPUBLIC INSURANCE COMPANY, PEERLESS INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA being dishonored with regard to the entry of merchandise into the United States through the Miami and Savannah Customs Districts, or any other Customs District.

5. Failing to release any merchandise covered by said Customs Surety bonds for the sole reason that said merchandise is subject to such bonds.

The Temporary Restraining Order issued July 16, 1981 is hereby dissolved.

This Preliminary Injunction shall remain in full force and effect until disposition of this case on the merits or until such further order of the Court.

Defendant's motion to dismiss is overruled.

A copy of this order shall be forthwith served on each of the defendants herein.

Dated: Miami, Florida; August 7, 1981.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decision

DEPARTMENT OF THE TREASURY, *August 10, 1981.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P81/139	Maletz, J. August 4, 1981	International Seaway Trading Corp.	67/47800, etc.	Item 700.60 20%	Item 700.70 15%, 13%, 12%, 10%, 9% or 7.5%	International Seaway Trading Corp. v. U.S. (C.D. 4773)	Seattle Footwear

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decision

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/285	Richardson, J. August 4, 1981	Kent International	79-11-01751, etc.	Export value	F.o.b. prices set forth in invoices of Willing Co., Ltd.	Agreed statement of facts	Philadelphia; San Juan; Boston; Seattle; San Francisco; Miami; Houston; New York Bicycles

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, AUGUST 20, 1981

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

SALMON GILL FISH NETTING OF MANMADE FIBERS FROM JAPAN

Notice of Commission Request for Comments Concerning Institution of Section 751(b) Review Investigation

AGENCY: United States International Trade Commission.

ACTION: Request for comments regarding institution of section 751(b) review investigation concerning affirmative determination in Investigation No. AA1921-85, Fish Nets and Netting of Manmade Fibers from Japan.

SUMMARY: The Commission invites comments from the public on whether changed circumstances exist which warrant the institution of an investigation pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. 1675(b)), to review the Commission's affirmative determination in investigation No. AA1921-85 regarding salmon gill fish netting of manmade fibers from Japan. The purpose of the proposed section 751(b) review investigation, if instituted, would be to determine whether an industry in the United States would be materially injured, would be threatened with material injury, or the establishment of an industry would be materially retarded, by reason of imports of salmon gill fish netting of manmade fibers if the antidumping order regarding fish netting of manmade fibers from Japan is modified or revoked with respect to salmon gill fish netting of manmade fibers provided for in item 355.45 of the Tariff Schedules of

the United States. Revocation or modification of the dumping finding as to salmon gill fish netting would not affect the Commission's affirmative determination as to other types of fish netting from Japan.

SUPPLEMENTARY INFORMATION: On April 18, 1972, the Commission determined that an industry in the United States was injured within the meaning of the Antidumping Act, 1921, by reason of imports of fish netting of manmade fibers from Japan determined by the Secretary of Treasury to be sold or likely to be sold at less than fair value (LTFV).

On June 1, 1972, the Department of the Treasury issued a finding of dumping (T.D. 72–158) and on June 9, 1972, published notice of the dumping finding in the Federal Register.

On July 28, 1981, the Commission received a request to review its affirmative determination in investigation No. AA1921–85. The request was filed pursuant to section 751(b) of the Tariff Act of 1930 by the Law Offices of George R. Tuttle on behalf of Seattle Marine and Fishing Supply Co., Nordby Supply Co., Redden Net Co., Fisheries Supply Co., Lummi Fishery Supply Co., Nets, Inc., Tacoma Marine Supply, Astoria Marine Supply, and Englund Marine Supply, importers of salmon gill fish netting from Japan.

Written Comments Requested

Pursuant to section 207.45(b)(2) of the Commission's Rules of Practice and Procedure (46 FR 18023), the Commission requests comments on whether the following alleged changed circumstances are sufficient to warrant institution of a review investigation: (1) the likelihood that there has been no significant manufacturing of salmon gill netting in the United States comparable to that imported from Japan, since approximately 1974, and (2) the likelihood that the decline of salmon gill netting production in the United States is not a result of LTFV imports from Japan, but rather the inability of U.S. netting manufacturers to produce a commerically competitive product due to technology inferior to that in Japan. In addition, comments are invited on petitioners's request that the Commission's injury determination on salmon gill fish netting of manmade fibers be revoked retroactively to approximately 1974 and that the determination be made within sixty days of institution rather than the one hundred and twenty days provided for in section 207.45(b)(3).

The Request for Review of the Injury Determination

Copies of the request for review of the injury determination and any other public documents in this matter are available to the public during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202–523–0161.

Additional Information

Under section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8), the signed original and 19 true copies of all written submissions must be filed with the Secretary to the Commission, 701 E Street, NW., Washington, D.C. 20436. All comments must be filed no later than 30 days after publication of this notice in the Federal Register. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request business confidential treatment under section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Each sheet must be clearly marked at the top "Confidential Business Data." The Commission will either accept the submission in confidence or return it. All nonconfidential written submissions will be available for public inspection in the Office of the Secretary.

FOR FURTHER INFORMATION CONTACT: Dan Leahy, senior investigator, Office of Investigations, U.S. International Trade Commission (202–523–1369) or Jane Albrecht, Esq., U.S. International Trade Commission (202–523–1627).

By order of the Commission.

Issued: August 11, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of CERTAIN SPRING ASSEMBLIES AND COMPONENTS THEREOF, AND METHODS FOR THEIR MANUFACTURE	Investigation 337–TA–88

Notice of Issuance of Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Issuance of exclusion order.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in connection with the importation or sale of certain spring assemblies and components thereof, and published notice thereof in the Federal Register of August 8, 1980 (45 FR 52945).

On July 14, 1981, the Commission unanimously determined that there is a violation of section 337 in the unauthorized importation and sale of certain spring assemblies and components thereof which infringe certain claims of U.S. Letters Patent 3,782,708 and which are the product of a process which, if practiced in the United States, would infringe certain claims of U.S. Letters Patent 3,866,287. The Commission further determined that the appropriate remedy is an order directing that the articles in question be excluded from entry into the United States.

Copies of the Commission's Action and Order, the Commission's opinion, and all other public documents on the record are available for inspection by the public during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Room 161, Washington, D.C. 20436, telephone 202–523–0161.

FOR FURTHER INFORMATION CONTACT: Jane Albrecht, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–523–1627.

By order of the Commission.

Issued: August 10, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN SURFACE GRINDING MACHINES AND LITERATURE FOR PROMOTION THEREOF } Investigation No. 337–TA–95

Notice of Termination of Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Termination of investigation as to respondents Bob's Machinery Sales and Cassiere Machinery Company.

SUMMARY: The Commission has terminated the above-captioned investigation as to respondents Bob's Machinery Sales and Cassiere Machinery Company based on written settlement agreements.

SUPPLEMENTARY INFORMATION: This investigation is being conducted under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) and concerns alleged unfair trade practices in the importation into and sale in the United States of certain surface grinding machines and literature for the promotion thereof. The complainant, Brown and Sharpe Mfg. Co., and respondents Bob's Machinery Sales and Cassiere Machinery Company jointly moved to terminate

the investigation as to aforementioned respondents on the basis of written settlement agreements.

Copies of the Commission's Action and Order and all other non-confidential documents filed in connection with the investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E St., NW., Washington, D.C. 20436, telephone 202-523-0155.

FOR FURTHER INFORMATION CONTACT: Clarease E. Mitchell, Esq., Office of the General Counsel, telephone 202-523-0148.

By order of the Commission.

Issued: August 10, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of CERTAIN LARGE VIDEO MATRIX DISPLAY SYSTEMS AND COMPONENTS THEREOF	Investigation No. 337-TA-75

Notice of Modification of Exclusion Order

AGENCY: U.S. International Trade Commission.

ACTION: Modification of exclusion order.

SUMMARY: On June 19, 1981, the Commission issued an Action and Order and Opinion in the above-captioned investigation. 46 F.R. 32694 (June 24, 1981). The Commission ordered that large video matrix display systems and components thereof, including spare parts, that infringe claims of U.S. Letters Patent Nos. 3,594,762; 3,941,926; or 4,009,335, and are manufactured by SSIH Equipment S.A., of Bienne, Switzerland, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, be excluded from entry into the United States for the remaining terms of said patents, except under license.

On July 16 and 17, 1981, the United States District Court for the Eastern District of Michigan held invalid U.S. Letters Patent Nos. 3,941,926 and 4,009,335 in the course of a patent infringement suit. Respondent SSIH Equipment S.A., of Bienne, Switzerland, has asked the Commission *inter alia* to stay the exclusion order in this investigation in its entirety. Motion Docket No. 75-33 (July 29, 1981). In accordance with its policy of deferring to the district courts in such situations, the Commission, on its own motion, is modifying its ex-

clusion order to suspend that portion of the order referring to the '926 and '335 patents, pending resolution of the validity of those patents on appeal.

FOR FURTHER INFORMATION CONTACT: Michael B. Jennison, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–523–0350.

SUPPLEMENTARY INFORMATION: Notice of institution of this investigation was published in the Federal Register. 44 FR 75242 (Dec. 19, 1979). On June 1, 1981, the Commission determined unanimously that there is a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the unauthorized importation and sale of certain large video matrix display systems and components thereof that infringe the claims of U.S. Letters Patent Nos. 3,594,762; 3,941,926; and 4,009,335, and that the appropriate remedy is an order directing that infringing articles manufactured by SSIH Equipment S.A., of Bienne, Switzerland, be excluded from entry into the United States for the remaining terms of the patents, except under license granted by the patent owner.

In the course of a collateral patent infringement suit, *Stewart-Warner Corp.* v. *City of Pontiac*, No. 79–73536 (E.D. Mich., unpublished order July 16–17, 1981), two of the three patents have been held invalid on the basis of their inventions having been on sale more than one year prior to the date of the application in the Patent Office. The question of the patents' enforceability was not reached by the court. Once a district court finds the two patents invalid, Stewart-Warner Corporation, the patentee and complainant in the Commission's investigation, is estopped from seeking to enforce them. *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 213 (1971). The Commission, therefore, is modifying its order so that it operates only as to the '762 patent, the validity of which was not at issue in the district court suit. The order now directs that articles infringing the '762 patent manufactured by SSIH Equipment S.A., of Bienne, Switzerland, be excluded from entry into the United States for the remaining life of the patent, except under license.

Copies of the Commission's modified Action and Order and all other nonconfidential documents in the record of this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161.

By order of the Commission.

Issued: August 10, 1981.

KENNETH R. MASON,
Secretary.

Investigation No. 104–TAA–5

SKI-LIFTS AND PARTS THEREOF FROM ITALY

AGENCY: United States International Trade Commission.

ACTION: Institution of a countervailing duty investigation.

SUMMARY: On November 22, 1968, the U.S. Department of the Treasury (Treasury) published in the Federal Register (33 FR 17291) a notice of final countervailing duty determination and suspension of liquidation of duties stating that it had determined that exports from Italy of ski-lifts and parts thereof benefited from bounties or grants within the meaning of section 303 of the Tariff Act of 1930. Accordingly, imports into the United States of such merchandise from Italy were subject to countervailing duties.

On January 1, 1980, the provisions of the Trade Agreements Act of 1979 became effective, and on January 2, 1980, the authority for administering the countervailing duty statute was transferred from Treasury to the U.S. Department of Commerce (Commerce). On May 13, 1980, Commerce published a notice in the Federal Register (45 FR 31455) of intent to conduct an annual administrative review of all outstanding countervailing duty orders.

On March 28, 1980, the U.S. International Trade Commission received a request from the Delegation of the Commission of the European Communities for an investigation under section 104(b)(1) of the Trade Agreements Act of 1979 with respect to ski-lifts and parts thereof from Italy. In accordance with section 104(b)(3) of the act, Commission notified the Department of Commerce of its receipt of a request for an investigation.

As required by section 751(a)(1) of the Tariff Act of 1930, Commerce has conducted its first annual administrative review of the countervailing duty order on U.S. imports from Italy of ski-lifts and parts thereof. As a result, Commerce, in the Federal Register of June 5, 1981 (46 FR 30161), preliminarily determined that the net subsidy conferred on such merchandise ranges from 15–35 lire per kilogram depending upon the particular component as shown below:

Ski-Lift Components:	*Countervailing duties in lire per kilogram*
Stations	18
Electric motors	35
Gasoline engines	35
Panels	15
Towers	18
Sheaves	20
Chairs	15
Cables	20
Launching	20

Monorail	15
Other metal parts	15
Nonmetallic parts	None

On the basis of that determination, the United States International Trade Commission, pursuant to section 104(b)(2) of the Trade Agreements Act of 1979, is instituting an investigation to determine whether an industry in the United States would be materially injured, would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports from Italy of the merchandise covered by the countervailing duty order if the order were to be revoked.

Commerce reported that it would issue a final determination in this case after analysis of issues received in written comments or at a hearing. However, no hearing was requested and no written comments had been received by the deadline for their submission to Commerce, July 6, 1981. Commerce's final determination as to the most current level of subsidies will be made as soon as possible.

EFFECTIVE DATE: August 10, 1981.

FOR FURTHER INFORMATION CONTACT: Stephen Miller, Office of Investigations, (202–523–0305), Jim McElroy, Office of Industries, (202–523–0258), or John MacHatton, Office of Investigations, (202–523–0439).

SUPPLEMENTARY INFORMATION:

Public hearing. The Commission will hold a public hearing in connection with this investigation on October 21, 1981, in the Hearing Room of the U.S. International Trade Commission Building, beginning at 10 a.m., e.d.t. Requests to appear at the hearing should be filed in writing with the Secretary of the Commission not later than the close of business (5:15 p.m., e.d.t.) on October 16, 1981. All persons desiring to appear at the hearing and make oral presentations must file prehearing statements and should attend a prehearing conference to be held at 3 p.m., e.d.t., on October 1, 1981, in Room 117 of the U.S. International Trade Commission Building. Prehearing statements must be filed on or before October 16, 1981.

Testimony at the public hearing is governed by section 207.23 of the Commission's Rules of Practice and Procedure (19 CFR 207.23). This rule requires that testimony be limited to a nonconfidential summary and analysis of material contained in prehearing statements and to new information. The Commission will not receive prepared testimony for the public hearing, as would otherwise be provided for by rule 201.12(d). All legal arguments, economic analyses, and factual

materials relevant to the public hearing should be included in prehearing statements in accordance with rule 207.22. Posthearing briefs will also be accepted within a time specified at the hearing.

Written submissions. Any person may submit to the Commission on or before October 16, 1981, a written statement of information pertinent to the subject matter of this investigation. A signed original and nineteen true copies of such statements must be submitted in accordance with section 201.8 of the Commission's Rules of Practice and Procedure, 19 CFR section 201.8 (1980). All written submissions, except confidential business data, will be available for public inspection.

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately and each sheet must be clearly marked at the top "Confidential business data." Confidential submissions must conform with the requirements of section 201.6 of the Rules of Practice and Procedure (19 CFR 201.6).

For further information concerning the conduct of the investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR 207), and part 201, subparts A through E (19 CFR 201).

This notice is published pursuant to section 207.20 of the Commission's Rules of Practice and Procedure (19 CFR 207.20, 44 FR 76458).

By order of the Commission.

Issued: August 10, 1981.

KENNETH R. MASON,
Secretary.

(19 CFR Part 200)

Amendment to Agency Ethics Rules

AGENCY: U.S. International Trade Commission.

ACTION: Final rule.

SUMMARY: In order to promote the orderly and efficient conduct of its investigations, the Commission adopts an amendment to its ethics regulations to allow employees to accept ground transportation in kind, of nominal value, in the course of investigative field trips, from representatives of the industry being investigated.

FOR FURTHER INFORMATION CONTACT: Michael H. Stein, Esq., General Counsel, USITC Ethics Counselor, 701 E Street NW., Washington, D.C. 20436, 202–523–0350.

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking was published on page 29729 of the Federal Register of June 3, 1981, which invited comments to be received by July 15, 1981. Comments were submitted by one individual and the Office of Government Ethics. The Office of Government Ethics stated its approval of the proposed regulation based upon the Commission's "representation that the transportation is of nominal value and would not be accepted in situations where such acceptance would give the appearance of partiality." The other comment received objected to the creation of exceptions to the rules prohibiting Government employees from soliciting or accepting anything of value from anyone having interests that may be affected by their performance or nonperformance of official duty, including the Commission's existing exception relating to the acceptance of food and other refreshments. The Office of Government Ethics has reviewed the rule change, however, and has found it to be consistent with the provisions of Executive Order 11222, 3 CFR 306 (1965 Compilation).

The U.S. International Trade Commission amends 19 CFR § 200.735–105 to read as follows:

(a) Except as provided in paragraph (b) of this section, no employee may solicit or accept * * * any gift * * * or any other thing of monetary value from any person who:

* * * * * * *

(2) Conducts operations or activities that are being investigated by the Commission * * *.

(b) The prohibitions set forth under paragraph (a) of this section shall not apply to:

* * * * * * *

(2) The acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on a field trip, *and of ground transportation of nominal value in the course of a field trip*, where an employee may properly be in attendance * * *.

By order of the Commission.

Issued: August 6, 1981.

KENNETH R. MASON,
Secretary.

(19 CFR 207.40)

Notice of Request for Public Comment on Termination of Countervailing Duty Investigation Concerning Steel Welded Wire Mesh From Italy

AGENCY: U.S. International Trade Commission.

ACTION: Request for comments on proposed termination of countervailing duty investigation under section 704(a) of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: Mr. Lynn Featherstone, Office of Investigations, telephone 202–523–0242.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether an industry in the United States would be materially injured, or threatened with material injury, or whether the establishment of such industry would be materially retarded, if the order were to be revoked. On March 28, 1980, the Commission received a request from the Delegation of the Commission of the European Communities for the review of the countervailing duty order on steel welded wire mesh from Italy (T.D. 68–149).

The Commission received a letter on July 22, 1981 from Hurricane Industries, Inc., the firm which now holds the assets of the original petitioner for the countervailing duty order, stating that it "does not wish to continue in this investigation and hereby withdraws the petition as it applies to our company."

The legislative history of section 704(a) indicates that the Commission should solicit public comment prior to termination of an investigation and approve the termination only if it is in the public interest. In light of the Commission's duty to consider the public interest, the Commission requests written comments from persons concerning the proposed termination of the investigation on steel welded wire mesh from Italy. These written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register.

By order of the Commission.

Issued: August 4, 1981.

KENNETH R. MASON,
Secretary.

(19 CFR 207.40)

Notice of Request for Public Comment on Termination of Countervailing Duty Investigation Concerning Certain Cap Screws From Italy

AGENCY: U.S. International Trade Commission.

ACTION: Request for comments on proposed termination of countervailing duty investigation under section 704(a) of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: Mr. Lynn Featherstone, Office of Investigations, telephone 202–523–0242.

SUPPLEMENTARY INFORMATION: The Trade Agreements Act of 1979, subsection 104(b)(1), requires the Commission in the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930, upon the request of a government or group of exporters of merchandise covered by the order, to conduct an investigation to determine whether an industry in the United States would be materially injured, or threatened with material injury, or whether the establishment of such industry would be materially retarded, if the order were to be revoked. On March 28, 1980, the Commission received a request from the Delegation of the Commission of the European Communities for the review of the countervailing duty order on certain cap screws from Italy (T.D. 76–225).

The Commission received a letter on July 23, 1981 from Counsel for Russell, Burdsall, and Ward, Inc., the original petitioner for the countervailing duty order, withdrawing its petition for a countervailing duty order on cap screws, one quarter inch in diameter and over, of iron or steel, from Italy.

The legislative history of section 704(a) indicates that the Commission should solicit public comment prior to termination of an investigation and approve the termination only if it is in the public interest. In light of the Commission's duty to consider the public interest, the Commission requests written comments from persons concerning the proposed termination of the investigation on certain cap screws from Italy. These written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register.

By order of the Commission.

Issued: August 4, 1981.

KENNETH R. MASON,
Secretary.

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